20853

United States Supreme Court.

OCTOBER TERM, 1903.

No. 225.

ISABELLA GONZALEZ,
Petitioner,

AGAINST

WILLIAM WILLIAMS, United States Commissioner of Immigration at the Port of New York.

Reply Brief for Petitioner.

Finality of Immigration Commissioner's Decision.

The Chinese Cases:

Chin Bak Kan *v.* U. S., 186 U. S., 193.
U. S. *v.* Lee Yen Tai, 185 U. S., 213.
Fok Yung Yo *v.* U. S., 185 U. S., 296.
Lem Moon Sing *v.* U. S., 158 U. S., 536.

The Chinese cases do not establish that the decision of the Immigration Commissioner on the subject of *alienage* is conclusive.

(1) The Chinese Exclusion Act differs from the Immigration law in general.

The Act of May 6th, 1882 (22 Stat., 58), provides that

> "no Chinese person shall be permitted to enter the United States, etc., and any Chinese person found

> unlawfully within the United States shall be caused to be removed therefrom to the country whence he comes, by direction of the President of the United States and at the cost of the United States, after being brought before some justice, judge or commissioner of the court of the United States and found to be one not lawfully entitled to be or remain in the United States."

The same provision was continued in the amended Act of July 5th, 1884 (23 Stat., 115).

The Act of May 5th, 1892 (27 Stat., 25), continued in force all laws prohibiting or regulating the entry of Chinese.

Section 3 of this latter Act of 1892, put the burden upon "any Chinese person of Chinese descent arrested under the provisions of this Act or the Acts hereby extended" to "establish by affirmative proof before a justice, judge or commissioner his lawful right to remain in the United States."

An Act of September 13th, 1888, contains similar provisions, most of which were dependent upon the ratification of the treaty of March 12, 1888, which was not ratified. Some of the provisions of the Act of 1888 have, however, been considered as in force, and one of such provisions gives to any Chinese "convicted before a Commissioner of the United States Court" a right to appeal to the judge of the district court. It was under this latter provision that the case of Chin Bak Kan *v.* United States was taken to the Supreme Court and the jurisdiction of the Commissioner to determine the "various facts on which citizenship depends," was upheld. This jurisdiction of the Commissioner was judicial. The hearing was a judicial hearing, and the decision of the Commissioner was a judgment from which appeal was allowed to a judge of the district court.

This is quite different from leaving the status of a person to be determined by an administrative officer. The case of *U. S.* v. *Lee Yen Tai*, presented the case of

a petitioner who alleged himself to be a merchant and not a laborer, and the main question determined in that case was that the treaty of 1894, had not abrogated the several acts regulating Chinese immigration.

Article 5 of such treaty provided that "the Chinese Government would not object to the enforcement of the Act of 1892." In the case of *Fok Yung Yo* v. *U. S.*, a Chinaman arrived at San Francisco and claimed to be in transit for Guatemala. The Collector of Customs denied him the privilege of further pursuing his journey through the United States and he was ordered deported. No question was raised in this case as to the alienage or nationality of the petitioner and his alienage being admitted, the decision of the proper executive officer as to the Chinaman's good faith with reference to his supposed transit, was held to be final.

This case followed that of *Lem Moon Sing* v. *U. S.*, in which Mr. Justice Harlan speaking for the court, said, with reference to the contention that the administrative officer's decision could not be final.

> "That view, if sustained, would bring into the courts *every case of an alien* who claimed the right to come into the United States under some law or treaty, but was prevented from doing so by the Executive Branch of the Government."

This will defeat the manifest purpose of Congress in committing to subordinate immigration officers and to the Secretary of the Treasury exclusive authority to determine whether a particular *alien* seeking admission into this country belongs to the class entitled by some law or treaty to come into the country or to a class forbidden to enter the United States.

This decision, we submit presupposes the alienage and sustains the finality of the Executive Officer's decision upon whether such "alien" could be admitted.

This is the view taken by the United States District Court, Wheeler, *J.*, in April, 1899, in *U. S.* v. *Yee Mun*

Sang, in which the court held that the finality of the Executive decision was only with reference to the causes for which an alien, an admitted or proved alien, might be excluded, but that the law did not commit to an administrative officer the determination of the status of the person seeking admission. The court says:

> "But citizenship of the country is a status of the person, that is attendant at all times everywhere and cannot be taken away, or but in a formal way, as provided by law, be renounced even by act of the person. If the appellant was in fact a citizen of the United States, he would not lose his citizenship by presenting himself as an alien merchant to the customs officials for admission to this country as such." * * *

"The validity of this provision (28 Stat., 390), rests upon the power of Congress to exclude aliens from the United States and to commit the decision of their right to come or to remain to Executive officers." *Nishimura Ekin* v. *United States,* 142 U. S., 651; *Lem Moon Sing* v. *U. S.,* 158 U. S., 538.

"This is because *they are in fact aliens* and as such may be excluded and not because the power to decide whether they are aliens or citizens has been or could be committed finally by Congress to customs officials or other executive officers. In this case the officers did not assume to decide that the appellant was an alien, but assumed that he was such and to decide that he was not so made to appear to be a *merchant* as to entitle him to admission to this country as an alien Chinese merchant and excluded him from admission as such." (93 Fed. Rep., 365-66.)

(2) It is at the least very doubtful if the provision in the Act of August 18th, 1894 (28 Stat., 390), is applicable to any but the Chinese Exclusion Act.

The Act of August 18th, 1894, is the "Sundry Civil Expenses Appropriation Act." At page 390, 28 Stat.,

is a provision under the sub-heading "Enforcement of the Chinese Exclusion Act" appropriating the sum of $50,000 for enforcing the provisions of the Act of May 5th, 1892, followed by this paragraph:

> "In every case where an alien is excluded from "admission into the United States under any law "or treaty now existing or hereafter made, the de- "cision of the appropriate immigration or customs "officers, if adverse to the admission of such alien, "shall be final, unless reversed on appeal to the Sec- "retary of the Treasury."

This closes the sub-heading: "The Enforcement of the Chinese Exclusion Act." Then follows another sub-heading, "Bureau of Immigration," which has a number of provisions for increasing head money, appointment of commissioners, payment of inspectors, and the requirement of a report from the Secretary of the Treasury of some plan for the organization of the immigration service.

Whether under these circumstances it can be held that this paragraph and a sub-heading relating to the Chinese Exclusion Act can be held to apply to anything more than the enforcement of that Act, is worthy of consideration.

In this relation, the enacting clause of the Immigration Law, March 3, 1891 (26 Stat., p. 108), is significant. It is as follows:

> "Be it enacted, etc., that the following classes of "aliens shall be excluded from admission into the "United States, in accordance with the existing "acts regulating immigration, other than those "concerning Chinese laborers."

Answers to Government Brief.

I.—The Government counsel called attention to the terms of the Mexican Treaty, at page 17 of their brief, and we call the attention of the Court to the similarity

between the provisions to be found there and the provisions in the Treaty of Paris of 1898, by putting in parallel columns the provisions of the two treaties.

The Mexican Treaty of 1848 has the following provisions:

"Art. 8. Mexicans now established in Territories previously belonging to Mexico and which remain for the future within the limits of the United States, as defined by the present Treaty, shall be free to continue where they now reside, or to remove any time to the Mexican Republic, etc.

Those who shall prefer to remain in the said Territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said Territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States."

The Treaty of Paris provides as follows:

"Art. 9. Spanish subjects, natives of the Peninsula, residing in the Territory over which Spain, by the present treaty relinquishes or cedes her sovereignty, may remain in such Territory or may remove therefrom, etc.

In case they remain in the Territory they may preserve their allegiance to the Crown of Spain by making, before a Court of Record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the Territory in which they may reside."

In the case of Mexico, the inhabitants of the territory who had not elected to remain Mexicans were "considered to have elected to become citizens of the United States."

In the case of Spain, natives of the Peninsula of Spain who had not declared their intention to preserve their allegiance to Spain were "held to have renounced it and to have adopted the nationality of the territory in which they may reside."

In the Spanish Treaty the privilege of holding to their old allegiance was only given to natives of the Peninsula, consequently all others were necessarily endowed with "the nationality of the territory in which they may reside." There are only two nationalities in the territory which was the subject of the Treaty of Paris, *i. e.*, the Cuban nationality, for the Island of Cuba, and the American nationality for the remainder. The creation of a portion of such territory into the body politic known as the people of Porto Rico, is not an endowment of nationality. There is no Porto Rican nationality.

II.—The case of *U. S.* v. *Laverty*, cited at page 18 to 20 of the brief, is simply to the purport that the annexation of French territory could not change the citizenship of inhabitants of British allegiance.

III.—*Inglis* v. *Sailors' Snug Harbor*, cited at page 22 of the brief, affirms the doctrine for which we contend: That *the allegiance* of all the inhabitants of a subdued and annexed country is due to the new sovereign, and being so due to the new sovereign, they cease to be aliens with reference to such new sovereign.

IV.—*Elk* v. *Wilkins*, relied upon at page 23 of the brief, is based upon the well-known theory that the Indian tribes with whom the United States made treaties were "alien nations, distinct political communities." As members of such tribes owing allegiance to the tribes,

to the "distinct political community" the individual Indian was held incapable of becoming a citizen of the United States by mere abandonment of his tribe and without the assent of the United States in some manner expressed.

The assent of the United States to the "nationalization" if not to the "naturalization" of Porto Ricans, is conveyed in the Treaty of Paris.

V.—The San Domingo case, *Caignet* v. *Pettit*, 2 Dal., 234, at pages 26 to 28 of the brief, is in disaccord with the doctrine of *Elk* v. *Wilkins* and intimates that because a French subject expressed his "dissent from revolution" and "refused allegiance to the new government and withdrew from the territory of France" he thereby ceased to be a French citizen or subject. This evidently he could not do without "becoming the subject or citizen of another country" which he had not done.

The unfortunate individual was not without a country. He had revolted against and repudiated his own, but it was still his.

VI.—The State Department case referred to in pages 29 to 31 of the brief, does not militate against appellant's contention.

Gisbert was, upon the representation of the United States Government that he could not "be regarded as a subject of Spain, liable for military service," exempted from such service.

The Chinaman who claimed American citizenship for his son was shown not to have possessed Spanish citizenship, and thus, under the doctrine of the Laverty case, already cited, to have remained uninfluenced by the transfer of Spanish territory.

Mercado was clearly held to have abandoned his domicile or inhabitancy of Porto Rico by a continued absence of fourteen years, which excluded him from the operation of the treaty, while Molinas, whose absence from Porto Rico was shown to have been with an intention to return, was held to be included within the treaty.

VII.—This statement of the nationality of the appellant, taken from page 36 of the Government brief, is sufficient to show her right to come into the United States and her exclusion from the operation of the Immigration Laws, which are intended as a barrier between the United States and foreign countries and as a protection of Americans from the injudicious admixture of foreigners. "The *previous foreigner* has now come under the sovereignty of the United States; that is the dominant and general allegiance; it involves a corresponding right of protection."

The fact also emphasized at the same page of the brief, that this previous foreigner "is also a member of the people of Porto Rico and thus belongs fully to the local body politic," though "not yet a member of our domestic body politic" we have no quarrel with.

The fact that he is one of the people of Porto Rico does not change his national status as an American.

The shifting "of allegiance and protection impressing the new nationality" upon the Porto Rican as suggested at page 55 of the brief, is quite sufficient to eliminate "the alien's status of the Porto Rican as shown by the quotations which the Government Brief furnished at pages 50 to 52 from *U. S.* v. *Percheman, Downes* v. *Bidwell,* and the *Diamond Rings case:*

The people change their allegiance, their relation to their ancient sovereign is dissolved; but their relations *to each other* and their rights of property remain undisturbed.

> " Doubtless, the subjects of the former sovereign
> " are brought by the transfer under the protection
> " of the acquiring power, and are so far forth im-
> " pressed with its nationality."

> " The Philippines thereby ceased in the language
> " of the treaty to be Spanish. Ceasing to be Span-
> " ish, they ceased to be a foreign country. They
> " came under the complete and absolute sovereignty
> " and dominion of the United States, and so became

"territory of the United States over which civil "government could be established. The result was "the same, although there was no stipulation that "the native inhabitants should be incorporated into "the body politic, and none securing to them the "right to choose their nationality. Their allegi- "ance became due to the United States, and they "became entitled to its protection."

In conclusion therefore, the appellant respectfully submits that, even assuming *arguendo* that petitioner did not necessarily acquire the full status of citizenship, nevertheless her undoubted American nationality is sufficient to entitle her to admission into the United States, and definitely negatives the possibility of her being included within the operation of the Immigration law.

All of which is respectfully submitted.

Dated, New York, December 9th, 1903.

FREDERIC R. COUDERT, JR.,
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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

No. 225.

ISABELLA GONZALEZ,
Petitioner-Appellant,

vs.

WILLIAM WILLIAMS, U. S. Commissioner of Immigration at the Port of New York.

Statement of the Case.

This is an appeal by Isabella Gonzalez from an order of the Circuit Court of the United States for the Southern District of New York dismissing a writ of *habeas corpus* and remanding petitioner-appellant to the custody of the defendant-appellee United States Commissioner of Immigration at the port of New York (Record, fol. 21).

The petition alleged that petitioner, Isabella Gonzalez, was a native-born inhabitant of Porto Rico and was such at the time of the proclamation of the Treaty of Paris (April 11, 1899); that upon arriving from said island of Porto Rico on the 4th day of August, 1902, the said defendant had detained her in custody, pre-

vented her landing and was threatening to return her to Porto Rico (Record, fol. 1).

The return of the defendant to the writ of Habeas Corpus alleged that pursuant to the powers vested in him by the United States Immigration laws he had detained said Gonzalez as an "alien immigrant," in order that she could be returned as such in case it appeared probable that she might become a public charge (Record, fol. 6).

The Circuit Court dismissed the writ on the ground that the petitioner not having been born in the United States nor having ever been naturalized, retained the same status that she had before the cession of Porto Rico by the Treaty of Paris, consequently she was an alien and the Commissioner had jurisdiction to detain or deport her (Record, fols. 15-17).

The sole question here involved is the alienage of appellant.

If she is not an alien the Commissioner admittedly had no jurisdiction and the writ should not have been dismissed.

The law under which the Commissioner acted is as follows:

United States Stat. at Large, Vol. 26, p. 1084 (Chapter 551) provide:

"That the following classes of aliens shall be "excluded from admission into the United States "in accordance with the existing acts regulating "immigration other than those concerning Chinese "laborers: All idiots, insane persons, paupers or "persons likely to become a public charge. * * *

"Section 8. That upon the arrival by water at "any place within the United States of any *alien* "*immigrants*, it shall be the duty of the command- "ing officer and the agents of the steam or sailing "vessel by which they came, to report the name, "*nationality*, last residence and destination of "every such alien before any of them are landed.

"* * * All decisions made by the inspection "officers or their assistants touching the rights of "any alien to land, when adverse to such right shall "be final unless appeal be taken to the Superin- "tendent of Immigration, whose action shall be "subject to review by the Secretary of the Treas- "ury. It shall be the duty of the aforesaid offi- "cers and agents of such vessel to adopt due precau- "tions to prevent the landing of any alien immi- "grant at any place or time other than that desig- "nated by the inspection officers, and any such "officer or agent or person in charge of such vessel "who shall either knowingly or negligently land "or permit to land any alien immigrant at any "place or time, etc.

"Section 10. That all aliens who may unlaw- "fully come to the United States shall, if practi- "cable, be immediately sent back on the vessel by "which they were brought in. * * *

"Section 11. That any alien who shall come into "the United States in violation of law may be re- "turned as by law provided, etc."

Introduction.

This case is noteworthy in that it involves much more than the liberty of an individual. The answer to the question whether or not petitioner is an alien must settle the status of all the native islanders who were in existence at the time the Spanish possessions were annexed by the United States.

The "Insular Cases" have not determined the question nor are any of the precedents to be found in our history precisely similar to the case of the Porto Rican *ante nati*. This is due to the difference in the nature of our recent acquisitions and those made formerly.

Of the Indian little need be said. Nomad tribes do not long survive the contact with civilization.

The populations taken over from France and Mexico were insignificant in number. They were, moreover, largely of Caucasian race and civilization, and a growing stream of immigration soon made the new lands thoroughly American. Moreover, the two civilizations were in fact equal or nearly so, and the treaties both of Paris (1800) and of Guadalupe Hidalgo (1848), recognized that fact by according to the new inhabitants the rights of American citizens. Thus the problem as to the legal status of the inhabitants of Louisiana and the territory acquired from Mexico was solved or solved itself *ab initio*. The underlying theory upon which both treaties were based was "expansion" rather than "imperialism."

But the problem of to-day cannot be solved either by extermination, as in the case of the Indian, nor by assimilation, as in the case of the few Frenchmen and Spaniards. Neither the methods of Miles Standish nor those of Jefferson will suffice us now. We must move on a heretofore untrodden path and find precedents upon which to base intelligent legislation and administration, not so much in our own history as in that of other nations who have preceded us in attempting to govern non-assimilable peoples.

In such an argument as this we must begin by defining the necessary terms, otherwise we will end as do many legal discussions in having with much clamor demolished a man of straw.

The object is to ascertain exactly what, under existing law, is the constitutional and legal status of the Porto Rican born before April 11, 1899. To call him a citizen when we are in hopeless disagreement as to the meaning of that term will only result in creating added confusion.

If the Circuit Court was correct, then we have to-day a new and seemingly paradoxical legal category of "American Aliens." The object of language is to denote objectively existing facts or relations. What idea the mutually exclusive term "American Aliens" can

convey it is difficult to say. The man without a country would thus be transferred from the realm of poetry into the domain of law, since an affirmance of the decision here appealed from would declare the law of the United States, as expounded by its highest tribunal, to be that there exists under the jurisdiction of the United States a large class of persons who are strangers and aliens here and in every other nation of the globe. There can be nothing in law or in fact to justify or necessitate so extraordinary a result.

Brief of the Argument.

I.—The petitioner-appellant cannot be sent back by the Immigration Bureau unless she is an "alien immigrant." If she does not fall within that class the statute cannot affect her; the Commissioner of Immigration had no jurisdiction, and the writ should have been sustained.

II.—The petitioner is not an alien because on April 11, 1899, she ceased to be a Spanish subject and her allegiance unquestioned, complete and permanent, was transferred to the Government of the United States by the Treaty with Spain proclaimed on that date.

This proposition is demonstrated by the following considerations:

(*a*) Allegiance is determinative of nationality or subjection. Our law of nationality, *i. e.*, the law which determines what persons are American nationals as contradistinguished from foreigners or aliens was derived from and must be examined in the light of the common law. That law makes nationality or subjection dependent upon allegiance.

(*b*) In the United States the tests as to what constitutes "nationality" or "subjection" are the same as the English common law. The problem has here been con-

fused, however, by the use of the word "citizen" in two senses. It is generally and properly used to indicate the holder of political rights or privileges in a State; as has been aptly said of a citizen in a democracy, "one who possesses a homeopathically diluted dose of sovereignty." Such persons may be accurately characterized as active citizens (burghers). The word has also been used in its broad sense as denoting all members of the nation and in this sense it has been considered as identical with subjection at the common law. Such persons may be characterized as passive citizens.

In our history there have been two apparent exceptions to the rule that passive citizenship and subjection are identical, and we have had persons who were neither citizens nor aliens. The free negroes under the Dred Scott decision were held by this Court not to be citizens, even in the general sense, yet they were not aliens but American nationals or subjects because their allegiance, complete and absolute was owing to the United States. Again, the Indian separated from his tribe was not considered a citizen, yet he could not well have been an alien, because he owed no other allegiance than to the United States.

Elk v. *Wilkins*, 112 U. S., 94.
Kazzahoo v. *Adams*, 1 Dil., C. C.

The Porto Rican is, therefore, under our law, a subject or national—the only really debatable question being as to whether he is a citizen in the general sense, having the civil rights and status of such or whether he is a mere subject like the free negro and the Indian above mentioned. In no event is he an alien.

III.—The Judge at Circuit based his decision on the ground that the petitioner, not having been born in the United States, nor naturalized by the Treaty, must have retained her original status just as though Porto Rico had not been annexed; consequently, she remained

an alien. Granting *arguendo* the premises, the argument is fallacious in assuming that because the petitioner is not a citizen, she is necessarily, and *ipso facto* an alien—no such alternative exists. The cession changed her allegiance. That fact is indisputable. The shifting of her allegiance changed her status from that of a Spanish national into an American national. The Court below overlooked the fact that there may be and have been subjects who are not citizens, and that the two are not necessarily exclusive terms. Hence his error. The treaty cession, if it did not *naturalize* the petitioner at least *nationalized* her.

IV.—This distinction between grades or classes of subjects or nationals is illustrated in the history of other countries. The French courts have held Algerians to be French subjects, in consequence of the *de facto* annexation of Algeria—although in the absence of legislation or treaty they could not be French citizens.

V.—A broad view of the Treaty leads to the conclusion that the natives were not only nationalized, but collectively naturalized by the cession.

ARGUMENT.

I.

Jurisdiction of the Immigration Commissioner.

The Commissioner could have no jurisdiction unless the petitioner were an alien. This is clearly stated by the learned Circuit Judge in the court below.

> "The only question open for discussion on this "application is whether or not petitioner is an "alien. Upon all other questions the decision of "the appropriate immigration officers, when ad-

" verse to the admission of the alien is made final, " unless reversed on appeal to the Secretary of " the Treasury. Act of Aug. 18, 1894 (28 Stat., " p. 390).

" It is true that this Court held to the contrary " *in re Martonelli,* 63 F. R., 437, following *in re* " *Panzara,* 51 F. R., 275, but the Act of 1894 was " not before it. The *Martonelli* case was decided " in October, 1894, before the statutes of that year " were published" (Rec., fols. 15-17).

II.

The cession of Porto Rico definitely transferred the allegiance of the native inhabitants from Spain to the United States.

The Treaty with Spain of December 10th, 1898, provides that:

"Article II.

" Spain cedes to the United States the Island of " Porto Rico and other Islands now under Spanish " sovereignty in the West Indies, and the Island of " Guam in the Marianas or Ladrones."

"Article III

" Spain cedes to the United States the arch- " ipelago known as the Philippine Islands, and " comprehending the Islands lying within the fol- " lowing line: * * *"

"Article IX.

" Spanish subjects, natives of the Peninsula, re- " siding in the territory over which Spain by the

"present treaty relinquishes or cedes her sover-
"eignty, may remain in such territory or may re-
"move therefrom, retaining in either event all
"their rights of property, including the right to
"sell or dispose of such property or of its proceeds;
"and they shall also have the right to carry on their
"industry, commerce and professions, being sub-
"ject in respect thereof to such laws as are applica-
"ble to other foreigners. In case they remain in
"the territory they may preserve their *allegiance*
"to the Crown of Spain by making, before a Court
"of Record, within a year from the date of the
"exchange of ratifications of this treaty, a declara-
"tion of their decision to preserve such allegiance;
"in default of which declaration they shall be held
"*to have renounced it and to have adopted the*
"*nationality of the territory in which they may*
"*reside.*"

"The civil rights and political status of the
"native inhabitants of the territories hereby ceded
"to the United States shall be determined by the
"Congress."

The treaty thus definitely accomplishes one legal result, it transfers the sovereignty of Spain over the Islands and their peoples to the United States and with such sovereignty necessarily the allegiance of the people, natives of Spain alone possessing the right to preserve their Spanish allegiance upon complying with the requirements of the treaty. The Porto Ricans have thus ceased to owe allegiance to Spain and now owe it to the United States. Whatever consequences follow from this fact cannot be avoided. But their allegiance or subjection having been transferred, they necessarily have become United States nationals or subjects. No other conditions are necessary to constitute American nationality.

The islanders cannot be aliens unless they owe allegiance to some other government, and even the most advanced anti-Imperialist will not contend that they are

still subject to Spain, however much he may deprecate the making of the Treaty of Paris.

The man without a country is not known to law. Having ceased to be Spanish subjects or nationals, Porto Ricans are no longer aliens and have become United States nationals or subjects.

The treaty actually accomplished a cession of the territory and a transfer of allegiance. It made the territory domestic territory (De Lima *v.* Bidwell, 182 U. S., 1.) The reservation as to political status and civil rights cannot change that cardinal fact. The country ceased to be a foreign country, yet Judge Lacombe holds the native inhabitants to be foreigners.

Aliens are merely foreigners residing or sojourning in the United States. An alien is necessarily a foreigner and must owe allegiance to another country.

> "An alien is a foreigner, a person resident in one "country but owing allegiance to another." Ency. Law, Alien.
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> "Alien, not belonging to the same country, land "or government or the citizens or subjects thereof; "foreign; as alien subjects, enemies, property, "shores; wholly different in nature; foreign; ad- "verse." Webster's International Dictionary.
>
> "Alien, a stranger born; a person born in an- "other or foreign country as distinguished from a "native or natural born subject or citizen; in "English law, one born out of the legiance or al- "legiance of the king; in American law, one born "out of the jurisdiction of the United States. 2 "Kent's Com., 50. Alien and Foreigner are "synonomous terms. 1 Pet. R., 343." Burrill's Law Dictionary.

When the Porto Rican ceased to owe allegiance to Spain, it is difficult to see how he could still remain a foreigner. He was an inhabitant of domestic territory. Certainly he occupied a different relation to the United States from that which he had previously sustained.

He became subject to its laws and its exclusive sovereignty. These facts must have some significance.

The treaty could not take away his Spanish allegiance, transfer it to the United States and leave him unaffected.

The status of alienage or non-alienage depends upon facts. The facts accomplished by the treaty were none the less facts because the power was reserved to Congress to pass upon the status of the Islanders. Congress cannot make red men white men, even by Joint Resolution, nor can they make Porto Ricans aliens by calling them such. In order to become aliens they would have to pass under another domination. They might be transferred to Spain or ceded to some other power or given independence, but until then they *are and must remain United States nationals.*

The fact of alienage necessarily involves the idea of a power to whom allegiance is due. But no man or woman can owe the debt of allegiance without an equivalent. Who feels the advantage should also bear the burden, says the old adage; but it is equally true that he who is called to bear the burden should derive some benefit or compensation therefrom. What "commodum" or advantage does the appellant reap from her situation? To whom does she owe allegiance, outside of the United States? What nation in the wide world will raise, nay, will be permitted by us to raise a finger or even a voice in behalf of this woman if she is injured in her property and restrained in her liberty? What flag may she look to in her necessity, outside the flag of the United States? Against what Government or nation may she commit treason? And if she should commit such acts, in Porto Rico, against the sovereignty of the United States as constitute that crime, would she go unwhipped of justice because she had not been naturalized a citizen of the United States?

If it should be claimed that a Treaty alone and without an act of Congress cannot raise her out of her condition as a derelict alien, it is plain that such a claim cannot be sustained. The Treaty became from the date

of its ratification the supreme law of the land, and the language here is plain and unequivocal. Spain *cedes to the United States* the Island of Porto Rico and other islands now under Spanish sovereignty in the West Indies. This cession, accepted as it was, by the United States, necessarily transferred the sovereignty to this Government. That sovereignty plainly is, as it must be, exclusive of any foreign power.

Either Miss Gonzalez is an undefined waif, on the sea of political uncertainty, or she *belongs* to the United States, and may look to it for protection against injury, for redress where wrong has been done and for assistance where it may be needed against any Government of the earth, Spain included. The new master, viz., the United States, takes her allegiance with a burden, and having deprived her of all claim on the old master, has taken his place.

Other clauses of the Treaty make these considerations even more obvious than they might be if unaided by the terms of that instrument. To some extent, at least, the contracting parties had in contemplation the possible rights of the Spanish citizens who were transferred to a new sovereignty. There is a saving clause allowing an option to *Spanish subjects, natives of the Peninsula,* residing in the territory over which Spain by the Treaty relinquished or ceded her sovereignty. Such residents might *preserve* their allegiance to the Crown of Spain by making before a court of record a declaration of their intention to preserve such allegiance; otherwise they would be held to have renounced it and to have adopted "the *nationality* of the territory" in which they might reside.

> "Manifestly the *nationality of the inhabitants* "of territory acquired by conquest or cession be- "comes that of the government under whose domin- "ion they pass subject to the right of election on "their part to retain their former *nationality* by "removal or otherwise, as may be provided."
>
> Boyd *v.* Thayer, 143 U. S., at p. 162.

This clause may not directly assist Miss Gonzalez, for she is not a native of the Peninsula, and if she were, she has not availed herself of the privilege of filing the necessary declaration within the year. But is it not quite palpable that she has become vested with the same "nationality" as the Spanish native of the Peninsula who has chosen to sever his connection with Spain by failure to file the necessary declaration? It can hardly have been in the contemplation of the parties to the treaty that she and those similarly situated should be without any "nationality" whatever, while other ex-Spaniards assumed by their non-action the nationality of the territory in which they happened to reside. It seems plain that the intention was to make nationality the rule upon which the sole exception engrafted, was that in behalf of the native of the Peninsula. If he was satisfied with the "nationality" of American Porto Rico, he need only abstain from acting at all and the general rule of nationality applied to him.

III.

Allegiance determines Nationality.

(*a*) Nationality, broadly speaking, means simply membership in some political community. In the ancient world it was dependent upon descent (citizenship *jure sanguinis*) the State being based on the clan, *i. e.*, tribal law. The descendant of a citizen was always a citizen wherever born, and the descendant of a foreigner always a foreigner, unless actually naturalized by positive legislation. At Rome the rule was "once a peregrine always a peregrine." The *Jus Sanguinis* thus inherited from the Roman law became the law in Europe, but for obvious historic reasons never took root in England. In that country the rule of *Jus Soli, i. e.*, subjection or citizenship because of birth within the King's

allegiance and dominion, was the law from the time of the Norman Conquest. As Prof. Pollock says:

> "A foreigner at the head of an army recruited "from many lands conquered England, became "King of the English and endowed his followers "with English lands. For a long time after this "there could be little law against aliens, there "could hardly be such a thing as English national-"ity" (History of the English Law, vol. I, p. 443).

Thus it came about that by the English law:

> "As regards the definition of the two great "classes of men which have to be distinguished "from each other, the main rule is very simple. "The place of birth is all important. A child born "within any territory that is subject to the King "of England is a natural-born subject of the King "of England" (*Id.*, p. 441).

Coupled with this rule, which has continued in England to be the law down to the present, was the doctrine of indelible allegiance and consequent denial of the right of expatriation. Hence the rule "once a subject always a subject"—but this doctrine was modified so that the right to change one's allegiance was finally recognized by allowing British subjects to expatriate themselves and aliens to become subjects by letters patent from the Crown or by Act of parliament, *i. e.*, by denization or naturalization.

Thus the sole requisite necessary to constitute a British subject is allegiance or subjection. This subjection, whether due to birth within the King's dominion or to a transfer of allegiance from a foreign sovereignty to English sovereignty, is the one essential requisite for determining the nationality of the individual. Either he owes allegiance to the sovereign or he does not. In the one case he is a subject, in the other he is an alien.

It is quite evident that these two categories include all men and leave no middle class.

Whatever number of classifications may exist as to subjects and what rights, civil or political, belong to each class or how diverse may be the privileges accorded by law or treaty to aliens of one nation or another, the English rule leaves no room for quibble as to who are aliens and who are subjects.

It is quite clear that by the common law a change of sovereignty from a foreign domination makes the inhabitants, both *ante nati* and *post nati,* British subjects.

> "Naturalization by conquest was the conse-
> "quence of that change in the law of war by which
> "the conqueror instead of gaining captives and
> "slaves and property, obtained dominion and
> "subjects. This was the law soon after the arrival
> "of the Normans in England, and was certainly
> "understood to be so as early as the reign of Henry
> "II, when the people of Ireland became his sub-
> "jects from the conquest of the island. Lord
> "Coke mentions in his report of Calvin's case,
> "among the ways by which the denization of an
> "alien may be effected—that of conquest.
>
> "'As if the King and his subjects should con-
> "'quer another kingdom or dominion, *as well ante*
> "'*nati as post nati,* as well they which fought in
> "'the field, as they which remained at home for the
> "'defense of their country, or employed elsewhere,
> "'are all denizens of the Kingdom or dominion
> "'conquered.'" Coke Reports, Part VII, folio 6
> * * * "by such operation of law it is not too
> "much to assert, said Chalmers in 1814, that there
> "had been acquired to the British Empire since
> "the commencement of the present reign forty
> "millions of subjects." (Chalmers' Colonial Opinions, 663) Lawrence's Wheaton. Appendix. p. 894.

The English rule on the subject is admirably ex-

pounded by Lord Mansfield in *Campbell* v. *Hall,* 1 Cowper's Report, 204 (1774). This was an action against the collector of customs of the Island of Grenada to recover certain duties there levied in accordance with a Royal decree. The case thus involved the question as to the power of the Crown over captured territory, Grenada having been captured from the French and Parliament having taken no action in regard thereto.

> "The special verdict then states some articles "of the capitulation. * * * It next states "the 6th Article where to a demand of the inhab- "itants of Grenada, requiring that they should be "maintained in their property and effects, etc., the "answer is the inhabitants *being subjects* of Great "*Britain,* will enjoy their properties and priv- "ileges in like manner as the other, his majesty's "subjects, in the other British Leeward Islands; "so that the answer is that *they will have the con- "sequences of their being subjects,* and that they "will be as much subjects as any of the other Lee- "ward Islands."

Lord Mansfield then states general propositions governing such a case.

> "A country conquered by the British Arms be- "comes a dominion of the King in the right of "his crown; and therefore, necessarily subject "to the legislature, the Parliament of Great Brit- "ain."
>
> "The 2nd is, *That the conquered inhabitants "once received under the Kings protection, be- "came subjects, and are to be universally con- "sidered in that light, not as enemies or aliens."*

The converse of this proposition is equally true. It is so stated by the eminent English commentator on International Law, Westlake.

"The cession of a British territory, or the "acknowledgment of its independence, causes the "loss of their British nationality by all persons "domiciled within it at the date of the cession." Int. Private Law, 203.

Doe *v.* Acklam, 2 B. & C., 779, held that all British subjects in America became aliens on the signing of the treaty recognizing American independence.

In the case of the Stepney Election Petition, 1886, 17 Q. B. D., 54, it was held that Hanoverians, born before the accession of Victoria, were British subjects, *not aliens*, but by the separation of the Crown they became aliens and could not vote in England. Lord Coleridge there said:

"It has long been settled that while the crowns "of the countries, are held by the same persons "the inhabitants of the two countries are not aliens "in the two countries respectively. * * * "

"The Hanoverian by birth who had needed no "naturalization in the life time of William IV "needed it when the Hanoverian heir and the suc- "cessor of that monarch was no longer the sov- "ereign of these islands. * * * He became "an alien because the sovereign to whom his allegi- "ance was due became a foreign sovereign; "* * * The crowns had by accident, been "united in one person, but when the union of the "crowns came to an end the union of allegiance "ceased too."

Thus the English law both ancient and modern is quite plain. Had Spain ceded Porto Rico to England in the same manner as she did to the United States, no possible doubt could have existed that the native inhabitants were British subjects. No question could have arisen here had it not been for the ambiguous meaning of the term citizen in American law.

The United States Government did not claim until this case arose that the islanders were aliens. The Attorney-General in the Insular cases took the position that they were subjects.

> "To be called an American subject is no dis-
> "grace. The term does not imply anything as to
> "the nature or form of the Government of which
> "one is a subject. It imports only that a person is
> "within the protection and allegiance,—either
> "permanent or temporary—of a particular sover-
> "eignty; it may be imperial or it may be republi-
> "can. *It does not signify in any degree the grade*
> "*or status of citizenship occupied by the person*
> "*within the domestic economy of his sovereign.*"
>
> "*The Insular Cases.*" Brief of Atty-Gen., 172.

(*b*) The question as to the meaning of the term citizen and what constitutes citizenship under the United States Constitution and laws, must be examined in the light of the English law.

U. S. v. *Wong Kim Ark*, 169 U. S., 655.

See also

Minor v. *Happersett*, 21 Wall., 162.
Ex parte Wilson, 114 U. S., 417.
Boyd v. *U. S.*, 116 U. S., 616.
Smith v. *Alabama*, 124 U. S., 465.
Moore v. *U. S.*, 91 U. S., 270.

> "The interpretation of the Constitution of the
> "United States is necessarily influenced by the fact
> "that its provisions are framed in the language of
> "the English common law and are to be read in the
> "light of its history."
>
> Justice Matthews in *Smith* v. *Alabama*, 124 U. S., 478.

"British subject means any person who owes "permanent allegiance to the crown" (Dicey Con- "flict of Laws, 173-7). *"Nationality or Allegi- "ance* in substance depended * * * not upon "the locality of a man's birth, but upon his being "born within the jurisdiction and allegiance of the "King of England."

"The term 'citizen' as understood in our law is "precisely analogous to the term 'subject' in the "common law, and the change of phrase has en- "tirely resulted from the change of Government" *Wong Kim Ark.*, 169 U. S., at pp. 657-8-664.

In a very recent case this Court again said:

"The term 'citizen' in our law is precisely "analogous to the term 'subject' in the common "law and the change of phrase has entirely re- "sulted from the change of government. The "sovereignty has been transferred from one man "to the collective body of the people and a 'sub- "ject' of the king is now a 'citizen' of the State."

Hennessy *v.* Richardson, 189 U. S., at pp. 34-35.

That the terms citizen and subject are at present identical in meaning is clear from *Minor* v. *Happersett*, 21 Wall., 162.

"The very idea of a political community, such "as a nation is, implies an association of persons "for the promotion of their general welfare. Each "one of the persons associated becomes a member "of the nation formed by the association. *"He owes it allegiance and is entitled to its "protection.* Allegiance and protection are, in "this connection, reciprocal obligations. The one "is a compensation for the other; allegiance for "protection and protection for allegiance.

"For convenience it has been found necessary to "give a name to this membership. The object is to

"designate by a title the person and the relation he "bears to the nation. For this purpose the words "'subject,' 'inhabitant' and 'citizen' have been "used and the choice between them is sometimes "made to depend upon the form of the govern- "ment. Citizen is now more commonly employed, "however, and as it has been considered better "suited to the description of one living under a re- "publican government, it was adopted by nearly "all the States upon their separation from Great "Britain, and was afterward adopted in the Arti- "cles of Confederation and in the Constitution of "the United States. *When used in this sense it "is understood as conveying the idea of member- "ship of a nation and nothing more*" (pp. 165-6).

As has been tersely said by an eminent publicist:

"The law knows nations only as political com- "munities, as sovereign and independent States. "*Nationality,* therefore, as a legal attribute of per- "sons, is connection with a certain body politic, "membership in a particular State. The members "of a State are called its subjects or citizens. The "former term, if properly construed, is applicable "to the people of any nation without regard to the "form of government, for every State is based "upon the relation of its members to its sover- "eign. But the word subject has become historic- "ally associated with the theories of feudal and "absolute monarchy, and has thus fallen into dis- "favor."

(Encyclopædia Political Science and United States History, article Nationality, by Munroe Smith.)

Mr. Butler in his recent work says that the word nationality is used to "distinguish the people of "the United States as a people rather than as a "race; the people of the United States forming as

"they do, a nation, are necessarily composed of
"many races—Christian and Mohammedan—
"Anglo-Saxon, Teutonic and Latin—Jew and
"Gentile—all of these, as well as other racial ele-
"ments, unite in forming one people as a nation;
"in this sense therefore 'nationality' signifies as to
"the people, the element of homogeneity by which
"all these people are united, regardless of internal
"and sectional differences, into a great nation,
"owing allegiance to a common government as
"against all of the other governments of the
"world."

Butler, Treaty Making Power, p. 16*n.*, vol. I.

Summing up on this point it seems perfectly clear that the transfer of the allegiance of the native inhabitants made them subject to the jurisdiction of the United States; they were no longer foreigners, or aliens, but became subjects or nationals. This is enough for the purpose of the case, but the matter is of such importance that the question may perhaps be elucidated by inquiring whether, if having ceased to be aliens, they have become citizens or whether they form a class of nationals who are not also citizens.

III.

The change of allegiance, while it made the Porto Rican born before the cession a national or subject, did not necessarily make him a citizen.

The steps by which the Circuit Judge reached his conclusion that the petitioner was an alien are as follows:

I.—The inhabitants of Porto Rico were aliens prior

to the ratification of the Treaty of Paris, April 11, 1899.

II.—As such alien inhabitants they could only become citizens of the United States by naturalization.

III.—The petitioner having been born before the treaty, must show that she has been naturalized. She could invoke no law save the treaty of annexation. But conceding the possibility of collective naturalization by treaty, the Treaty of Paris expressly reserved the "civil rights and political status of the native inhabitants" to the future action of Congress.

IV.—Congress not having legislated as to the naturalization of Porto Ricans, they have not become citizens; *therefore, their original status remains unaffected and they are aliens.* Or to use the learned Judge's exact language:

> " Being foreign born and not naturalized, she re-
> " mained an alien and subject to the provisions of
> " law regulating the admission of aliens who come
> " to the United States" (Record, p. 16).

Thus, according to this decision, there is no middle ground between citizens and aliens, and any one who is not an American citizen is necessarily an alien.

"An American alien" certainly would seem, at least to one unaccustomed to some of the startling paradoxes of the law, a strange and monstrous category. Is it a logical result? We think not, and for the following reasons:

It is true that the ninth clause of the Treaty provides that the civil rights and political status of the native inhabitants of the territories ceded to the United States shall be determined by Congress. But this determination belonged to Congress in any event. It may plausibly be contended that the natives of Porto Rico did not

become "citizens" by virtue of the Treaty, for the Treaty does not in terms make, or profess to make, them such. It would be enough for our purpose that it "nationalizes" them, which may be quite different in its effect from "naturalizing" them.

If there is no difference between a national and an alien it was quite possible to exclude Miss Gonzalez from our country, because she had not gone through the forms of naturalization and renounced her allegiance to some foreign power which she would have found it difficult to name. If she had named Spain, which had rejected and repudiated her, an element of humor might be injected into the case, but would not relieve it of its difficulties.

"The political status and civil rights" having been reserved for the future action of Congress, it is possible to argue that no naturalization has taken place; it has, however, already been shown that the Porto Ricans were nationalized, that is to say, their allegiance transferred, but as nationalization does not necessarily mean naturalization, it may well be that they occupy an intermediate status between citizens of the United States and aliens. In other words, they are certainly entitled to the protection of the government, and, as far as foreign nations are concerned, are Americans, yet they may not be vested with all the rights of citizens of the United States.

What these rights of citizens of the United States are, it is very difficult to determine. The trend of doctrine in the Supreme Court of the United States seems to be that most of the rights of citizenship are under the protection of the States themselves, that civil liberty was not nationalized by the Fourteenth Amendment, and that only such rights as are expressly secured by the Constitution of the United States belong to the citizen; that for the vindication of all others he must look to the State. Thus the citizen of the United States who is not also a State citizen, but an inhabitant of a Territory, holds his rights subject to the discretion of Congress,

except in so far as that body may be limited by the express mandates of the Constitution. *Civil Rights cases, 109 U. S., 3.*

In the recent case of *Maxwell* v. *Dow,* 176 U. S., 581 at pp. 588-9, the Court quotes, with approval, the language of Mr. Justice Miller in the *Slaughter House cases,* referring to Section 2 of the Fourth Article of the Constitution, wherein it is provided that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. The Court says:

> "We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature *fundamental;* which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union from the time of their becoming free, independent and sovereign. What these fundamental principles are it would be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; * * * The enjoyment of life and liberty with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

It is thus apparent that the rights of citizens of the United States are almost impossible of definition. The general right to life, liberty and property, provided for by the Constitution and more specifically by the ten Amendments in favor of civil liberty, applies to all men alike, whether citizens or aliens. *Wong Wing* v. *U. S.,* 163 U. S., 228. See also Woodrow Wilson, The State, p. 498, §917.

The only positive right conferred by the Constitution

upon a citizen as such seems to be the right to sue in a Federal Court. This was the right which it was held that Dred Scott did not possess because not a citizen. Thus, as far as the Government of the United States is concerned, the inhabitants of the Islands, assuming them to be nationals, but not citizens, could hardly be said to have any lesser civil rights in fact than full citizens of the United States. While they could not sue in Federal Courts, this would scarcely be an additional burden to those that remained at home, because this right only belongs to a citizen of the United States residing in a State. It is not possessed by the residents of the District of Columbia, nor of the Territories of the United States.

As far as the action of the States themselves is concerned, the matter becomes somewhat more complicated. One of the most natural illustrations is as to the holding of real estate in the various States. In many of our States there exists as an obsolete remnant of the old and barbarous *Droit-d' aubaine,* the law by which an alien holder of real estate is subject to an action of forfeiture. This rule, according to the learned Mr. Pollock, arose historically from the habit of the English Crown of confiscating the estates of Norman nobles, situated in England, who swore allegiance to the Crown of France after the separation of Normandy from England. This practice ripened with time into a general rule of law. Its illustrious origin has long been forgotten, and it now remains as a remnant of ancient, time-honored law. History of the English Law, Vol. I, 441-50.

It is to be noted, however, that the right to hold real estate free from any interference on the part of the Government is not a right inherent in the citizen as such, but that the prohibition is simply a disability of alienage. Thus, if our theory be correct, a Porto Rican might well hold real estate in the City of New York, free from molestation by the Attorney-General, because, even if not considered a citizen, he certainly is not an alien, and, therefore, not under the consequent disabilities.

It is thus apparent that there are very few, if any, civil rights which in such a view he would not have in common with citizens.

As to political rights, however, the situation is entirely different. Usually, though not always, the right to vote in the various States is conditioned upon citizenship of the United States, and, if our theory be correct, statutes to this effect might not apply to a Porto Rican national, and thus in the absence of State legislation, especially made to fit his case, he would not be allowed to vote in the States. As some of the States, however, allow aliens to vote, after a declaration of intention to become citizens, this disability could and would easily, if the State desired it, be removed for the benefit of those of our new inhabitants who desired to settle in the States.

As a writer on International Law recently put it (Mr. Randolph, in his excellent article on "The Insular Cases"), "There is nothing in the Constitution of the United States to prevent a State from inviting an immigrant to go from the wharf to the polls and vote for presidential electors." Columbia Law Review.

It is thus manifest that the distinction here made between aliens and nationals is very important for the Islanders themselves, and if held sound by the Supreme Court of the United States, they will not be under the disability of alienage and will enjoy nearly, if not quite, all the ordinary civil rights pertaining to the citizen.

On the other hand, the distinction between the two classes of nationals, namely, citizens of the United States, that is to say, those born or naturalized within the United States, and those not born or naturalized therein, but owing allegiance thereto, is important. If Porto Ricans are not citizens of the United States, all the political privileges accorded by law to citizens as such would not apply to them, and thus in the absence of special legislation they would have no political rights in the various States until the States chose to change their legislation. In so far as the Islanders remaining at home are concerned, they would, in any event, be subject to the complete control of Con-

gress in the matter of political rights, the Constitution placing no limitation upon Congress, acting in and for the Territories, in that respect. In this regard they would be under no greater political disability than inhabitants of the District of Columbia.

It seems to us that this conclusion harmonizes with the general theory of the Treaty makers and the general policy of the government, which is to confer the ordinary civil rights upon the new inhabitants, while withholding from them all political privileges.

It may be asked whether they have the right to trial by jury and to the other civil rights guaranteed by the Constitution. It is sufficient to say that these rights are in no wise dependent, either upon citizenship or alienage. They are accorded to all persons within the United States—although that term is now impossible of delimitation. (Moulor Cases, 182 U. S.)

It is quite possible, however, that the Supreme Court might decide that some of these limitations were only operative upon Congress when acting within the United States, in the narrow sense, proper, and that, therefore, they did not apply to the new inhabitants. (Territory of Hawaii v. Osaki Mankichi, 190 U. S.) It is thus seen that this question is entirely beside that of citizenship or alienage and has only to do with the applicability of certion portions of the constitution when limiting the power of Congress in legislating for the new territory.

This theory, while according to our new nationals certain rights, and conferring upon them a country, does not in any way interfere with the policies of the people of the United States by giving to the new peoples any political power, and hence any voice as to our government or institutions. They are alike cut off, in both cases, from any injurious interference in the destinies of the nation.

It is evident that there may be various gradations or subdivisions of subjection. Subjects may possess varying degrees of civil or political rights as is well said by one of the latest writers upon the subject.

> " Generally the term citizen is used in regard to " the 'national' invested with all civil and political " rights. We must not, however, confuse, as is too " often done, these two terms. *Every national in-* " *deed is not a citizen, although every citizen is a* " *national.* In France, for instance, minors, mar- " ried women and incompetents are not citizens, " but they nevertheless possess French nationality; " they are deprived of political rights and only " possess the enjoyment of civil rights. The Alge- " rians have not even the enjoyment of civil rights; " they are governed by the Mussulman law in their " relation between themselves, and yet they have " been solemnly declared Frenchmen by the *sena-* " *tus consultus* of 1865, and the decisions of the " Court had upon several occasions theretofore " recognized that they possessed this quality " (French nationality)." (Cogordan, La Nation- alité, pp. 7-8.)

The great publicist Bluntschli following the same line of thought, says:

> " The body of full citizens rise above the general " mass of the members of a country or nation. " Full citizenship implies membership in the na- " tion, but more than that, it implies complete po- " litical rights; it is thus the fullest expression of " the relation of the individual to the State." (Theory of the State, English translation, p. 203.)

The framers of the Constitution probably supposed that in the United States, nationality and subjection were identical, that is to say, that all persons within the permanent allegiance of the United States were citizens just as such persons had been subjects of Great Britain before the Revolution. This view seems to have been practically undisturbed in the United States until the famous case of *Dred Scott* v. *Sanford,* 19 How., 399, which held that subjection and citizenship were not

necessarily identical and that there existed a class of persons in the United States who, although not aliens, were nevertheless not citizens. We refer to the status of the free Negro before the enactment of the XIVth Amendment.

> "The words (in the Constitution) 'people of the "United States' and 'citizens' are synonymous "terms, and mean the same thing. They both de- "scribe the political body who, according to our "republican institutions, form the sovereignty, and "who hold the power and conduct the Government "through their representatives. * * * Con- "gress might, as we have before said, have author- "ized the naturalization of Indians, because "they were aliens and foreigners. * * * *The "African race, however, born in the country, did "owe allegiance to the Government, whether they "were slave or free; but it is repudiated and re- "jected from the duties and obligations of citizen- "ship in marked language"* (pp. 404-5).

The question involved in the Dred Scott case was whether a free negro could sue as a citizen in the federal courts, and the decision was based upon the fact that he could not have been a member of the political people. It was the impossibility that he should have been invested with political rights that led the Court to declare him a mere subject.

The status of the colored race was, until the enactment of the XIVth Amendment changed their status, settled by this decision.

Mr. Chief Justice Fuller in his dissenting opinion in the case of *United States* v. *Wong Kim Ark*, 169 U. S., 649, says:

> "Nor would a naturalization law excepting per- "sons of a certain race and their children be in- "valid, unless the amendment has abridged the "power of naturalization. This cannot apply to

"*our colored fellow-citizens, who never were* "*aliens.*" (p. 729).

It was for the purpose of removing from our jurisprudence this class of persons who owed the United States allegiance and yet were not citizens that the XIVth Amendment defined citizenship. This definition made citizenship and subjection at the common law identical, as Mr. Chief Justice Fuller said, in the Wong Kim Ark Case (p. 727) referring to the fact that the 14th Amendment was intended to apply to the colored race:

> "They were not aliens (and even if they could be "so regarded, this operated as a collective nat- "uralization) and their political status could not "be affected by any change of the laws for the "naturalization of individuals."

As this Court said in *Elk* v. *Wilkins,* 112 U. S., 101:

> "The main object of the opening sentence of the "XIVth Amendment was to settle the question, "upon which there had been a difference of opinion "throughout the country and in this Court, as to "the citizenship of free negroes (Scott *v.* Sandford, "19 How., 393); and to put it beyond doubt that "all persons, white or black, and whether formerly "slaves or not, born or naturalized in the United "States, and owing no *allegiance to any alien* "*power,* should be citizens of the United States "and of the State in which they reside."

The only other instance in the history of the United States in which subjection and citizenship have not been identical is that of the status of the Indian living apart from his tribe and who has assumed the habits of civilization.

In the case of *Elk* v. *Wilkins, supra,* it was held that an Indian, born a member of one of the tribes, who was voluntarily separated from his tribe and had taken

up his residence among the white citizens of a State is not a citizen of the United States within the meaning of the XIVth Amendment.

The theory as to the legal status of Indians has always been, since the case of the Cherokee Nation *v.* Georgia, 5 Peters, 1, that the Indian member of a tribe owed immediate allegiance to his tribe, which was in turn under a general protectorate of the United States, and hence did not come either within the definition of subjection at the common law, or within the purview of the XIVth Amendment. Consequently it was necessary to consider him as an alien, a member of a tribe which the United States recognized at least as *quasi* independent by making treaties with it.

> "The Indian tribes, being within the territorial "limits of the United States, were not, strictly "speaking, foreign States; but they were alien "nations, distinct political communities, with "whom the United States might and habitually "did deal, as they thought fit, either through "treaties made by the President and Senate, or "through acts of Congress in the ordinary forms "of legislation. The members of those tribes "owed immediate allegiance to their several tribes, "and were not part of the people of the United "States" (*Elk* v. *Wilkins*, 112 U. S., p. 99).

On this theory, therefore, Elk was held not to be a citizen of the United States; having, however, renounced his allegiance to his tribe, it would seem that he had become at least a subject of the United States, and this was the view expressed by Mr. Justice Harlan in his dissenting opinion.

> "If he (Elk) did not acquire national citizen- "ship on abandoning his tribe and becoming, by "residence in one of the States, subject to the com- "plete jurisdiction of the United States, then the "Fourteenth Amendment has wholly failed to ac-

> "complish, in respect of the Indian race, what, we "think, was intended by it; and there is still in "this country a despised and rejected class of per- "sons, with no nationality whatever, who, born in "our territory, *owing no allegiance to any foreign* "*power,* and subject, as residents of the States, "to all the burdens of government, are yet not "members of any political community nor entitled "to any of the rights, privileges, or immunities of "citizens of the United States" (*Elk* v. *Wilkins*, 112 U. S., p. 122).

Evidently Congress considered that an end should be put to so anomalous a situation and soon enacted that Indians who had separated themselves from their tribes and taken up civilized life should be considered citizens of the United States. (24 Statutes at Large (1887), chap. 119, sec. 6, p. 388, at p. 390.)

We have instanced the case of the free negro and of the Indian separated from his tribe, as the only illustration within our history in which it was possible to consider that we had a class of persons who, while owing allegiance to no foreign government, were not citizens, but merely subjects of the United States.

This is doubtless due to the fact that in our history we have been so little brought into contact with races inferior to us in development and civilization. Our former growth has been rather by expansion and assimilation than through the method of imperialism, *i. e.*, the domination over men of one order or kind of civilization, by men of a different and higher civilization. The negro problem was set at rest by the war and the Fourteenth Amendment; the Indian problem by the ruthless progress of civilization, which compelled the opening up and exploiting of the American continent by the overflowing population of old Europe. In the contact, the Indian gradually perished and the problem was reduced to very minor proportions through the agencies of fire water, gunpowder and well-intended but unwise policy.

The logic of events is often more powerful than that of Aristotle.

IV.

Illustrations of distinction between subjects and citizens.

Other civilized nations have, however, been brought into contact with uncivilized or semi-civilized tribes or people who became wholly subject to their jurisdiction, and whose legal status it was consequently necessary to solve.

We have seen that the English law has always treated such persons from the moment of the severance of their allegiance from their former masters as British subjects.

This natural and necessary consequence is also admirably illustrated by one of the most recent territorial acquisitions of France,—that of Algeria.

> "The conquest of a country like Algeria gives "rise to questions which cannot be governed by the "application of the ordinary rules of law followed "in Europe. In practice it has been admitted "that the Algerians were *French subjects*, not citi- "zens (it must be remembered) from the moment "that their country was definitely annexed to "France. Hence the tribunal of Paris did not "hesitate to declare, even before the treaty of "Tafma, of 20th of March, 1837, that the Alge- "rians were like other Frenchmen, dispensed from "the necessity of furnishing security for costs," Cogordan, La Nationalité.

The question was thus very similar to that involved in this case, as in neither case had the executive or the legislative authorities conferred any rights of citizenship

upon the annexed people, but their allegiance had been transferred from their former sovereign to the new one. The Court of Cassation declared that although there was no legislation fixing their status, and it had not been established by any treaty, nevertheless the Ordinance of the 10th of August, 1834, had submitted the Algerians to French law and sovereignty, and from that time it was no longer possible to treat them as aliens.

> "In declaring in its Art. 109 the union of "Algeria and the Colonies to the French Republic, "the Constitution of November, 1848, did not ef- "fect anything as to the nationality of the inhabi- "tants; since we find the counsel for the order of "lawyers of Algeria contesting the claim of a "native to be a Frenchman and hence the "possibility of his admission to the bar; "this case coming before the Court of Cassa- "tion it was held that by the very fact of the "conquest of Algeria the Israelite natives became "French subjects. Placed, indeed, under the "direct and immediate sovereignty of France, they "are unable in any event to claim the benefit or "aid of any other nationality, *from which it fol- "lows necessarily that the quality of Frenchmen "can alone thereafter be the basis and rule of their "civil and political condition.*" Glard, Nationalité Francaise, p. 380.

In matters of private law the Mohammedan subjects were left under their own rules and customs.

The French Government thus recognized a situation which we, until very recent years, refused to recognize in the case of the Indians, namely, that such tribes or peoples living under a different law and civilization, possessing a complete organization of their own, should be treated as nationals of the sovereignty to which they were really subject, but should be in their private relations governed by their tribal law. While we did not interfere with the tribal

law of the Indians, we yet affected to assimilate them rather to a foreign people than to nationals, and made treaties with them, in preference to legislating for them directly. Our legal theory was thus at variance with the actual facts.

The Algerian subject is accorded no political rights whatever and can possess none except by becoming a French citizen. This the Algerian may become either by legislation, for example, the Décret Crémieux, October, 1870, conferred French citizenship on the Israelite inhabitants of Algeria, or by naturalization, but this naturalization is somewhat different from the naturalization of an alien. The Algerian has only to make a simple declaration before the mayor, and after examination as to morality, etc., by the mayor and upon the recommendation of the Council of State, the naturalization is granted as matter of right.

Already French, the native Mohammedan is subject after his naturalization to all the French civil and political laws; he pays the French and not the Arab taxes. He becomes immediately an elector, and eligible to Parliament, etc.

Glard, Nationalité Francaise, 263.

An analogous question was presented when France annexed Cochin China. The native Anamite inhabitant is declared by law (Decree 25th, 1881) French, but he remains subject to his own local laws and customs except in special cases in which by complying with certain formalities he may be placed under the jurisdiction of the French law, just as in Algeria he may acquire the civil rights of a citizen by showing that he has reached the age of twenty-one and is able to speak the French language, etc. (Cogordan, La Nationalité, p. 139).

By the cession of Taïti to France in lieu of the former protectorate, the whole native population became French subjects. The law (31 Dec., 1880), declared that "French nationality has been acquired (*de plein droit*) by all the former subjects of the King of Taïti."

"Such a disposition is self-explanatory; the "sole manner of escaping the result is emigration "or the acquisition of a foreign nationality; they "are no longer subjects of the king of Taïti" (Glard Nationalité Française, p. 408).

See also other illustrations mentioned in Argument for Plaintiffs in Error De Lima *v.* Bidwell, 182 U. S., 76-78.

We have thus seen that subjection is dependent upon allegiance, but that the civil and political rights of subjects may vary from those of the subjects who have full political rights (active citizens) to those who have limited civil rights (mere subjects). In our law and that of civilized States generally, except in cases of dependencies inhabited by semi or uncivilized people there are but two classes of subjects or citizens, namely, active citizens, that is to say those possessing political rights (burghers), and passive citizens, that is to say, those possessing full civil but no political rights, such as minors, women and incompetents. It is only, as the historic illustrations cited have shown, when civilized nations come into contact with people of a lower order of civilization that there is any disposition to refuse to subjects the ordinary civil rights. In Europe and America even aliens possess almost, if not quite all of the civil rights belonging to citizens, such as the right to possess property, to have recourse to the courts, etc.

It is for this reason that it has been difficult for us to apprehend that naturalization did not necessarily comport naturalization and that persons might cease to be foreigners or aliens without becoming citizens. We have seen that under our law the civil rights of citizenship in a broad sense, which would not also be possessed by any subjects or nationals of the United States, would be very few—the right to sue in the Federal Courts would be almost the only one belonging to passive citizens as distinguished from mere subjects. The fact that a national

was deprived of these rights would not convert him into an alien and he would not be governed by the laws relating to alienage.

V.

Conclusion.

There are three possible courses which this Court may adopt:

1. It may affirm the decision below and declare native islanders, born before the cession, aliens.

2. It may hold that the cession by transferring the allegiance of the natives made them United States subjects or nationals and that as such they are not under the statutory disabilities of alienage and cannot be deported under the Immigration law.

3. The Court may take the view that the cession of the Islands accomplished the naturalization of the native people and that they became passive citizens of the United States entitled to all civil rights of such.

See argument of undersigned counsel, De Lima *v.* Bidwell, 182 U. S., p. 3.

It seems to us quite obvious that the choice will be between the last two. It would be impossible to affirm the judgment of the Court below without leading to an absurd and unnecessary result. Plain terms would cease to have any meaning and we would consider aliens persons who owed us their sole allegiance and to whom we owed our protection. Such a result is too palpably defiant of the laws of thought and language, is altogether anomalous and we must respectfully submit is clearly impossible.

The Court might, however, adopting the suggestion of the Circuit Judge that the treaty expressly refrained from naturalizing the native population, hold that they were not citizens, and as such not possessed of any civil rights, but that they had become American nationals or subjects and were therefore, not within the purview of statutes aimed at aliens.

This result could be supported by the precedent of the free Negro and the detached Indian,

> *Dred Scott* v. *Sanford,* and *Elk* v. *Wilkins, infra,*

and was the view taken by the Attorney-General of the United States at the time of the argument of the Insular Cases. While it has some logical force and may be supported by the two precedents referred to as well as by the precedents adduced from the history of foreign nations, such as that of Algeria, it seems to us nevertheless to be a narrow view.

The third view would seem to be more compatible with sound political science, as well as more in accord with the spirit of our Constitution, and the jurisprudence of this Court. While it may be said that the treaty reserved to Congress the right to pass upon the civil rights of the native inhabitants, the treaty could not change facts. It had accomplished the cession and the results naturally and necessarily following from cession cannot be avoided.

It could not have made the country a foreign country by stating that it should remain foreign although ceded to the United States and subject to its plenary jurisdiction.

Even the treaty-making power and Congress together cannot change facts by violating the laws of language.

It therefore seems to us that the cession of the territory, its becoming domestic territory (DeLima *v.* Bidwell), with the transfer of the allegiance of its inhabitants, naturalized the natives in the sense that they became passive citizens of the United States, enti-

tled to all the rights, privileges and immunities of such. Boyd *v.* Thayer, 143 U. S., 162.

Unless we adopt this course we are forced to have recourse to the two precedents in our history of which we are least proud, and to introduce for the third time into our system a class of persons whom it has always been our object to be free from. The XIVth Amendment, annulling the result of the Dred Scott Case, the Act of Congress doing away with the result reached in Elk *v.* Wilkins, would go for naught, and we would again be confronted by a situation in which citizenship and subjection were not identical.

The two precedents above adverted to give us no encouragement to attempt for the third time a repetition of that peculiar, and, from the standpoint of American civilization, most anomalous result.

All of which is respectfully submitted.

Dated, New York, November 30, 1903.

FREDERIC R. COUDERT, JR.,
PAUL FULLER,
CHARLES E. LEBARBIER.
Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

ISABELLA GONZALEZ, Appellant, vs. WILLIAM WILLIAMS, United States Commissioner of Immigration at the Port of New York.	No. 225.

WASHINGTON, D. C., Friday, December 4th, 1903.
2.30 o'clock, P. M.

The above-entitled cause came on for hearing before the Court after recess, the Chief Justice and all the Associate Justices being present.

Present on behalf of the petitioner-appellant, FREDERIC R. COUDERT, Jr., Esq., and PAUL FULLER, Esq.
Present on behalf of the United States, HENRY M. HOYT, Esq., Solicitor-General, and MILTON D. PURDY, Esq., Assistant Attorney-General.

Argument of Frederic R. Coudert, Jr., Esq., on behalf of the Petitioner-Appellant.

MR. COUDERT: If the Honorable Court please: This, again, is a Porto Rican case. I may preface by saying that it differs from the other Porto Rican cases that have

been argued at this bar at various times, in that it does not involve, as we understand it, any constitutional questions as distinguished from rights obtained under the Treaty of Paris and conferred by the common law; and therefore, the question as to whether the Constitution is there in force or not, or whether it is in modified force or not, is not here pertinent. The situation that has arisen here is a kind of an aftermath, I may say, of the insular decisions; it shows the length to which the Government has gone in interpreting those decisions as to the rights of people in the Territories.

This is an appeal by Isabella Gonzalez, a native-born Porto Rican, born before the cession, a young woman, from an order of the Circuit Court dismissing a writ of *habeas corpus,* and remanding the petitioner Gonzalez, to the custody of the defendant-appellee, United States Commissioner of Immigration at the Port of New York, in order that she might be returned under the Immigration law to Porto Rico, from whence she came to New York.

JUSTICE HARLAN: You say "before the cession." Was she born in Porto Rico?

MR. COUDERT: In Porto Rico, before the cession.

Isabella Gonzalez arrived at New York. She was detained by the Commissioner of Immigration under the United States Statute. The statute is very short, conferring jurisdiction upon that Commissioner; and as it is the basis of our contention, I will read it. It is on page 2 of our brief. It was admittedly acting under that statute, and without regard to any other power conferred upon him by any other law, that he detained the petitioner, examined her, and decided that she was liable to become a public charge, and therefore that he had a right to send her back. The statute says:

"That the following classes of *'aliens'*—note the word —shall be excluded from admission *into the United States* in accordance with existing acts regulating immigration"—note the word "immigration"—"other than those concerning Chinese laborers; all idiots, insane

persons, paupers, or persons likely to become a public charge. * * *

"That upon the arrival by water at any place within the United States of any alien immigrants"——

That is the category over which the Commissioner has jurisdiction, over alien immigrants——

"It shall be the duty of the commanding officer and the agents of the steam or sailing vessel by which they came, to report the name, nationality, last residence," etc., "of every such alien before any of them are landed. * * * That all aliens who may unlawfully come to the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in."

JUSTICE HARLAN: Was the petitioner coming here with any purpose of business, or is that material in the case?

MR. COUDERT: She was coming here, I think the record shows, to be married and to settle here. She had an uncle or relative who agreed to take charge of her and support her. This is all in the record, although, perhaps, not very material. He was a printer, and received a salary of twenty-five dollars a week. They held that that was a small amount, he had a large family, and that she might become a public charge; and they sent her back to Porto Rico, just as they would send her back to Austria, Hungary, or Turkey, if she had come from there and had small means.

JUSTICE DAY: When was this done, Mr. Coudert?

MR. COUDERT: I do not remember the——

JUSTICE DAY: It was after the exchange or ratification?

MR. COUDERT: Oh, yes, if your Honor please; it was on the 4th day of August, 1902.

JUSTICE DAY: And after the legislation concerning Porto Rico?

MR. COUDERT: It was after the legislative act concerning Porto Rico; yes, if your Honor please. It was a year after that. It was about a year ago.

There is no question of jurisdiction here. The judge below admitted that the sole question was whether or not the petitioner was an alien. Of course, I am quite well aware that under the Congressional statutes, the Commissioner has power to determine whether aliens shall be returned or not, and a great many questions concerning aliens. His jurisdiction, however, fundamentally depends upon whether the person is an alien or not. I assume (I have not seen the brief of the other side, it having just been submitted, and therefore I am arguing to the contentions of the Court below, which I presume have been adopted by my friends) that if I, a citizen of the United States, were coming from Europe, the Commissioner could hardly detain me and decide whether I was an alien or not, and if he considered that I was an alien return me to Porto Rico, or to France, or to England, or to anywhere that he chose. That, of course, would be an absurdity. The rights of American citizens cannot be determined by the Commissioner. The question is whether a person is an alien or not; and if the person is an alien, of course the Commissioner has jurisdiction under the immigration statutes which apply to aliens. If there is no alienage, of course, the basis of his jurisdiction fails; he has none. The Court below took that view. Judge Lacombe said that upon all other questions than that of alienage the decision of the appropriate immigration officers, when adverse to the admission of the alien, is made final unless reversed and appealed to the Secretary of the Treasury. So that the sole question, open for discussion in the application, is whether or not the petitioner is an alien.

If the Court please, this case seems to involve considerably more than the liberty of this one unfortunate woman, however precious that may be. It involves the status of a great many thousands, possibly millions of people, who, whatever else they may be, are subject to our laws, are subject to our will, are wholly subject to the government of this country.

The insular cases have not determined the question;

nor are any particular precedents to be found in our history, as it seems to me, similar to the question presented at bar. The expansion, or, as I think, more properly imperialism in which we have indulged in our colonial venture, is something different from any expansion that we have ever had before. The Indian problem was solved by gunpowder and fire-water and misguided philanthropy, and the same question did not arise. The question here is as to the legal status of a great, coherent mass of civilized people, who cannot and of course will not be exterminated, and who can not be assimilated as were the few Frenchmen and Spaniards in Louisiana and Mexico. The question is, what relation in our law do they occupy? Are they citizens? Are they subjects? Are they nationals?

So much by way of introduction, as showing (as we think) the important and the far-reaching effect of this decision.

The decision of the Commissioner was rendered under instructions from the Secretary of the Treasury. Naturally he asked for instructions on so delicate a subject; and he was informed that Porto Ricans should be treated as aliens. The order of the Secretary of the Treasury is to be found in our brief or in the brief filed by my esteemed friend the Commissioner from Porto Rico, as *amicus curiae*. There has been a curious condition of affairs in regard to this question. Once or twice before Porto Ricans had been detained. Professor Stanley Gomez, of Porto Rico, a well-known and learned gentleman, had been detained, and the Commissioner of Immigration sent to the Treasury Department for instructions, and the Treasury Department said they thought he was an American, and they let him go. Certain works of art painted by a native Porto Rican in Paris, but a Porto Rican who had not been in Porto Rico at the time of the cession, were brought in; and the question was whether they were the productions of an American artist. It was held, prior to this case that they were American paintings. How

they could have been American paintings if the painter had been an alien it is a little difficult for me to conceive. But the situation into which the immigration officers got themselves in admitting these people first under some theory that they were Americans and then finally keeping them out and treating them as aliens, is ridiculous and untenable.

The question, therefore, is simply this: whether the immigration law of 1882, which I have read, applied to a native-born Porto Rican; in other words, whether native-born persons in existence before the cession are included in the category "alien immigrants." If they are, if they are aliens in our country and under our flag, then when they come to New York or Boston I presume that they can be excluded at the discretion of the Commissioner, just as aliens from any other country can be. I do not dispute that.

JUSTICE HARLAN: Is there any question made here, or was there any in the Court below, or did the Court below consider, the question of the finality of the decision of the Secretary of the Treasury?

MR. COUDERT: The Court below said that the decision of the Secretary of the Treasury would be final in all cases where persons were aliens, as to whether certain aliens should go back. But, as he says, the jurisdiction of the Commissioner is predicated upon the fact of alienage. I do not suppose you or I, sir, could be detained by the Commissioner while he inquired into our status, and if he determined we were aliens he could send us back and we could not invoke the courts. Such a result, of course, would be an absurdity. He had no jurisdiction over us. His jurisdiction is over aliens. I do not think the Government will seriously dispute that.

JUSTICE WHITE: In other words, the question of finality is involved in the question of the merits?

MR. COUDERT: Precisely, sir—precisely. If, as your Honor has expressed it, the Commissioner had a right

to adjudge finally, then it was because they were aliens. I am glad you made that so clear.

JUSTICE HOLMES: A case arose in Massachusetts where a commission was appointed and was authorized to destroy horses that were suffering from some disease—I forget what—and in which it was held that the jurisdiction of the commission, although it involved the question of merits, depended entirely on the horses actually having the disease; and if it should be proved before a jury afterwards that any of the horses did not have the disease, then an action lay.

MR. COUDERT: I think this case would depend upon the disease of alienage.

JUSTICE BROWN: Suppose an unnaturalized resident of this country, we will say an alien, who had lived in this country for some years, went to Bermuda, we will say, and came back again: Would the law apply to him or not? Could he be excluded?

MR. COUDERT: That would depend on what the law says as to exactly what an "immigrant" means. I confess that I do not know. That is a puzzle. That would depend upon the term "immigrant." He would certainly be an alien. Whether he would be an immigrant or not would be another question. I should say, without knowing of any particular decision in point, that any alien migrating into the country or coming in at any time would be an alien immigrant.

JUSTICE BROWN: Does the statute use the word "alien immigrant?"

MR. COUDERT: It does in one part, if your Honor please. I will read it again:

"That the following classes of *aliens* shall be excluded from admission into the United States."

The term "alien" there, is used first alone. Then, in the body of the statute, it goes on:

"That upon the arrival by water at any place within the United States of any *alien immigrants.*"

I should say it would be fair to assume that the terms "alien" and "alien immigrant" are used as having one

and the same meaning, though in the first section of that same statute allowing the Commissioner to exclude it says that "the following classes of *aliens* shall be excluded from admission." Is that clear?

JUSTICE BROWN: Yes.

MR. COUDERT: Therefore we have advanced thus far that the jurisdiction of the Commissioner depended upon alienage; and the question is wholly, under the statute, as to whether these people were aliens or not.

We contend, first, that the petitioner is not an alien, because on April 11th, 1899, she ceased to be a Spanish subject, and her allegiance, unquestionable, absolute, permanent, was transferred to the Government of the United States by the treaty with Spain made on that date. I do not suppose it is necessary to argue before this Honorable tribunal what seems to us such a fundamental proposition, viz, the fact, uncontrovertible, undeniable, accomplished, that her allegiance was transferred. She had no other allegiance. Even the most advanced anti-imperialist would not claim that she still owes or owed, after the ratification of the treaty, allegiance to Spain.

JUSTICE BROWN: I was under the impression that there was an Act of Congress incorporating or appointing a government for Porto Rico that used the expression "citizens of Porto Rico."

MR. COUDERT: "Citizens and people;" "people," I think, of Porto Rico; "citizens" of Porto Rico; but——

MR. FULLER: Including native American citizens who might happen to be there.

MR. COUDERT: I go back to the treaty because the treaty seems to us to have transferred her allegiance. I do not know that the Government act throws much light on the subject. It evidently endeavored to dodge the question as to what their status was by saying that they were people of Porto Rico.

JUSTICE DAY: That section of the law is on page 8 of the record.

MR. COUDERT: I have the record before me. I was reading that law from my brief, on page 2.

JUSTICE DAY: The one Mr. Justice Brown inquired about, I think, is that section that Judge Lacombe quoted.

MR. COUDERT: That is, the people of Porto Rico?

JUSTICE DAY: Yes—as to their status as citizens of Porto Rico.

MR. COUDERT: Yes—citizens of Porto Rico, if your Honor please.

Now, the petitioner's allegiance was transferred. She had no other allegiance.

JUSTICE DAY: She was not within the class that were permitted to retain their allegiance to Spain?

MR. COUDERT: She was a native, if your Honor please. That appeared in the record. There is no question about that. She was a native. Her allegiance was completely transferred—I may be permitted to mention a notorious fact, although it is not in the record. Some of these unfortunate people went to the U. S. Commissioner and asked if they could be naturalized. The Commissioner told them they must foreswear their allegiance. They were very much embarrassed as to what allegiance they would foreswear, and they told him that they had none except that of the United States. He then said that he did not know how they could become citizens of the United States, because that he did not suppose that the naturalization laws meant that you should foreswear your allegiance to the United States in order to obtain allegiance to the United States and become a citizen. So that they were unable to do anything; and this case, coming up to this Court in the way that it has, will necessarily determine the question of their status.

The treaty provided that Spanish subjects, natives of the peninsula should have the option of retaining their nationality or *adopting* "the nationality of the territory in which they resided." And this phrase is very

pertinent, it seems to us, and pretty conclusive. If they did not retain Spanish nationality they were then held to have renounced it, and to have adopted the nationality of the territory in which they might reside. But, nationality is evidently determined by allegiance. A territory may be said to have the nationality of whatever country or independent sovereign government is over it. Therefore the Spanish inhabitants who remained had the same nationality as the native inhabitants; that is to say, the same nationality as Porto Rico, *i. e.*, American.

Their allegiance having been transferred absolutely and completely, our proposition is as follows:

Allegiance is determinative of nationality or subjection. Our law of nationality—that is to say, the law that determines what persons are American nationals as contradistinguished from foreigners or aliens (there must be a rule to determine that, and there is one, which is very clear), is derived from the English, the common law; consequently it must be examined in the light of the common law.

The common law makes nationality or subjection dependent upon allegiance. Discover the allegiance of an individual, and you have his nationality. Every individual must have some nationality. There are unfortunate individuals who, owing to the conflict of various European laws, have a double nationality, who may be liable to serve in the German army while having been naturalized in America. But the trouble with them is that they have too much nationality, not too little.

Nationality, therefore, is determined by allegiance; and the question of allegiance—that is to say, to whom allegiance is due—is determined by the common law. According to the common law, the question is quite plain. The criterion of the common law, as laid down in the case of Wong Kim Ark, the Chinese baby case, which went over the whole matter, was allegiance to the King. Birth or naturalization or nationaliza-

tion "within the obedience of the King" were determinative of subjection at common law.

As I understand it, subjection and citizenship have, with two possible exceptions, been, in this country, identical. That is to say, the tests which determine subjection as understood at the English common law determine citizenship, as that expression is used in the American law. The word "citizen" is the municipal law equivalent of the word "national." A debate arose, I think about 1800, in France, when the Consular Constitution was discussed; and the famous Abbé Sièyes proposed a constitution in which he spoke of French subjects. Immediately the old adherents of the Revolution rose up in horror and said: "All Frenchmen are citizens. We have no subjects. Subjection is an abhorrent term and has been abolished." Sièyes showed, however, quite conclusively, as appears in Mr. Thiers' "History of the Consulate and the Empire," that the terms "subject" and "citizen" were equivalents in international law, the term "citizen" being the term usually used in a country having a form of government not kingly or royal, possessing republican institutions; but that in either form of government every person belonged to one of two classes. He either owed allegiance to that government or he owed allegiance to some other government, and the persons who owed allegiance to that particular government were subjects in the broad sense of the word, and hence allegiance and subjection went together.

That was the English law. It is very old. It comes down from Norman times; and Pollock and Maitland explain, in their learned work on the "History of the English Law," that every person who owed allegiance to the crown was an English subject. Some curious instances of that have come up in the English Courts. In the annexation of the Island of Grenada, in the West Indies, described fully in the case of Campbell *v.* Hall, Lord Mansfield was confronted with the question as to the status of the native inhabitants of Grenada. It is very kindred historically to the

particular question here involved. Mansfield said, in substance: Their status is plain; from the moment that their allegiance was shifted they became British subjects. They could have no other possible status, both *ante-nati,* those born before the cession of Grenada, and *post-nati,* those born after the cession of Grenada.

Again when Hanover and Great Britain were under the same king, George the First, Hanoverians were held to be British subjects because the allegiance of both was the same; and in an earlier famous case, Calvin's case, when Scotland and England were united under one crown under James the First (the case of the *post-nati*), Lord Coke held that the allegiance of Scotchmen being owed to the King of England as king, therefore they ceased to be aliens and foreigners, to use his expression, in England, and became English subjects. And that doctrine was re-affirmed in a later case, Lord Coleridge writing the opinion, in which the question came up after the separation of England and Hanover upon the death of William IV, the English crown having passed to Queen Victoria, and, by the Salic law the Hanoverian crown having gone to the Duke of Cumberland, the heir in the male line. Certain Hanoverians attempted to vote in England as they had done before, as English subjects; and in the Stepney Petition case (I have forgotten the volume of the reports; I think it is cited in the brief) the Court held that while, at the moment of the joinder in one allegiance of Hanover and England, Hanoverians ceased to be foreigners and aliens in England, and possessed the rights of British subjects, yet from the moment when the crowns were separated, the allegiance was dissolved, and therefore they were not subjects any longer. In discussing the doctrine in Calvin's case, he said it was immaterial whether allegiance to the King was personal allegiance (as he expressed it), that "damned and damnable doctrine," or whether it was allegiance to the King as representing the whole people—allegiance to the crown, in other words; but that in any event the allegiance had been severed, and

therefore the converse of the proposition was true, and the Hanoverians had ceased to be English nationals.

That has been the rule in England from the earliest times, and is the rule in England to-day. In England there can be only two classes of persons, and those classes are mutually exclusive—aliens and English nationals or subjects.

I have used the word "national" because it is the equivalent of "subject." It has, perhaps, a less arbitrary sound, and it is used by many writers on international law.

JUSTICE BROWN: Does not one of the amendments to the Constitution define "citizens" as those born in the United States or naturalized?

MR. COUDERT: It does; and, if your Honor please, I want to take that up now. I wanted to show first what the English law was, and that our law was taken from the English law.

Mr. Justice Gray, speaking for the Court in the Wong Kim Ark case, said: The terms in the Constitution and in our law, "citizens," etc., must be determined with a view to the English law and to the canons laid down in the English law for determining subjection.

Under the English law, therefore, a person was a subject or he was an alien and a foreigner; so that if the question had at any time arisen in England there could not to be the slightest difference of opinion or question about it.

The question for us to determine here is whether our criterion is the same; whether we have adopted any different rule, so that subjection (or nationality, as I call it,) and alienage are to be determined by different rules than the rules laid down in the common law.

JUSTICE DAY: In other words, you make the claim that a person may not be a citizen and may not be an alien?

MR. COUDERT: I am about to make that claim.

We have reached the point, therefore, where from the standpoint of English law, and clearly from the

standpoint of international law, according to all the writers, such a person would be a United States subject or national; that is, a person owing allegiance to the United States. I have quoted in some of the papers here Cogordan's excellent book on "Nationality," in which he claims that persons must be either nationals or aliens, and that all persons owing allegiance to any government are nationals.

JUSTICE HOLMES: What book did you say?

MR. COUDERT: Cogordan's work on "Nationality."

JUSTICE HOLMES: I do not know it. You may have noticed Lord Cockburn's little pamphlet on the same subject.

MR. COUDERT: I have seen extracts and quotations from it in some of the public law writers; and I think, if your Honor please, that we have quoted it somewhere.

What is the situation so far as our law is concerned? My proposition, in answer to Mr. Justice Brown's kind question, is this—that at the American law citizenship and subjection, with two exceptions, have always been identical; that is to say, a person is either a citizen or a subject.

There are two exceptions; and in reply to Mr. Justice Day's contention I am coming to this point, that admitting, as we must——

JUSTICE DAY: I beg your pardon; it is not a contention.

MR. COUDERT: I stated it erroneously; I should have said "suggestion." I said that because it was in line with my contention here, and naturally it seemed to me to be sound.

JUSTICE DAY: I am trying to get your view, Mr. Coudert, as an aid to me in making up my opinion.

MR. COUDERT: Yes, if your Honor please; and it is an aid to me to have you put questions to me, so that I can order my argument to meet the suggestions of the learned justices.

My view is this, that it is quite possible that under the American law subjection and citizenship are not neces-

sarily identical; that there have been two instances, and only two, so far as I can find, in the history of American law, in which subjection or nationality and citizenship were not determined by the same tests, and persons were American nationals who were not also American citizens.

JUSTICE DAY: Would not "allegiance" be a better word than "subjection" there?

MR. COUDERT: Well, I use the word "subjection" because it is the common-law term. I have used "nationality" because it is an international law term, used by modern Italian and French writers on the subject, but said by them to be equivalent to "subjection," but which they used preferably because of the general republican feeling that subjection now relates to monarchic governments.

JUSTICE DAY: You will probably not find that term in any American discussion of the relations between the people of either the United States or its territories.

MR. COUDERT: Well, I remember that the Attorney-General at this bar stated that in his view (the view of the Government has shifted since then, perhaps owing to the decision in Downes *v.* Bidwell) these persons were American subjects; and, to use his own excellent and eloquent expression, "to be called an American subject is no disgrace," and he went on to enlarge the fact that the treaty, by transferring their allegiance, had made them subjects; but, to adopt your suggestion, perhaps it would be more proper to have called them liegemen. It made them American liegemen; but he contended that they were not citizens.

JUSTICE DAY: I prefer that term to the other.

MR. COUDERT: It is very much a question of taste, I presume; it has a flavor of poetry about it. But I want to emphasize the fact that the transfer of allegiance had some effect, and that nothing that Congress could say or could do could change that effect. If Congress legislated white men to be black men, or *vice versa,* it would not change the laws of physiology or anthropology. Congress cannot change the objective relation which exists in the mind of man between things. And there-

fore when Congress and the treaty-making power had transferred allegiance, the consequence must necessarily follow that these persons had become liegemen, nationals or subjects, all of which terms are absolutely identical as far as the law is concerned.

The view that was taken below—and I say this in answer to Mr. Justice Day's question, and then I will come back to the thread of the argument—was this: Judge Lacombe said——

JUSTICE WHITE: Pardon me; I have been trying to follow you.

MR. COUDERT: It is an effort, I know.

JUSTICE WHITE: You said you were going to give the two instances.

MR. COUDERT: I was going to give them.

JUSTICE WHITE: And you were interrupted.

MR. COUDERT: I am going to give the two instances, but I wanted to answer Mr. Justice Day first. I would like to follow the ideas of the Court, so far as that is concerned. It is indifferent to me which logical order we take up. I only hope to be able to cover it all without wearying the Court too much.

I will come back to the question of the two instances; but Judge Lacombe took the view (which points out exactly what he had in mind) that citizenship and alienage were necessarily exclusive terms, and that there was no middle category; for he argues:

Porto Ricans before the cession were Spanish subjects. (He used the word "subjects.") They were Spanish subjects, undoubtedly. Now, he says, the treaty intervenes, and expressly, by its provision as to native inhabitants, reserves their civil rights and political status to Congress. Therefore, reasoned Judge Lacombe, the condition or status of the Porto Ricans not having been changed, remains exactly the same as it was before; and having before been aliens, they are still aliens, and will remain aliens until the Government of the United States naturalizes them as citizens.

This seems to me to involve a fallacy in this, if your

Honor please: that Judge Lacombe overlooked the fact (even conceding his premises to be sound) that, excluding the naturalization clause, there may be a middle class of persons who are neither citizens nor aliens, and that the two terms are not necessarily and mutually exclusive. If that contention is sound, then Judge Lacombe's whole argument must necessarily fall to the ground.

We contend, and it is all that is really necessary for a disposition of this case, that for a third time in our history it is possible, taking what we consider to be a narrow but still a strictly logical view of the question, that subjection and citizenship are not absolutely co-extensive terms; that their orbit is not the same; that we have to-day in our law nationals or subjects who are not citizens, because their allegiance having been shifted expressly by the treaty, and there being no way of preventing that consequence, because we cannot claim that they owe any allegiance to anybody else, it is exclusive and mutual. Having shifted their allegiance, it has made them our subjects or liegemen in the sense that they are persons owing us allegiance; and if they owe allegiance to the Government of the United States, and if language as a means of human communication is of any value at all, they cannot possibly be foreigners or aliens. To contend that they are seems to us to be impossible.

The converse of that proposition came up in the Goetze case. It was held, or, rather, it was reasoned by Judge Townsend below (that was the first one of the insular cases that came to this Court) that the treaty having reserved the rights of these people, they still remained foreigners, and that as they were foreigners their country must consequently be foreign, and therefore, not within the meaning of the tariff laws.

Now that it has been held that their country has become domestic, Judge Lacombe still has gone on following in the line of thought laid down by Judge Townsend, and has held that although the country was domestic and ceased to be foreign, nevertheless the people in it were

aliens and foreigners; so that apparently the soil is American, but all its inhabitants are aliens or foreigners —a situation, I suppose, never reached before outside of comic opera; certainly never found in any legal category in any civilized country.

To come back to the suggestion made by Mr. Justice White, it is quite possible that there might be persons who were not citizens or aliens, and consequently, if they were not aliens, the immigration law would not apply; and therefore, the law not applying to them, the Commissioner would have no jurisdiction over them at all. Or, to make the illustration stronger, in many of our States an alien cannot hold real estate. Therefore, if the person is not an alien, but a United States subject, as the learned Attorney-General, Mr. Griggs, called them, then they would at least have the privilege, only denied to aliens, of holding real estate.

For instance, in the State of New York—and that illustration, it seems to me, makes it rather clear—the holding of real estate is dependent upon reciprocity. The French allow Americans to hold real estate in France; consequently in New York we allow Frenchmen to hold real estate, because reciprocity is our law. Now, if these people are aliens, as Judge Lacombe has decided, how could there possibly be any reciprocity between Porto Rico and New York? It is absurd, because we are practically all under one general national jurisdiction, and therefore, we could not look at a Porto Rican law as we look at a foreign law to see if a foreign sovereignty allows New York citizens to hold real estate in Porto Rico. Of course, citizens of New York are bound to be able to hold real estate in Porto Rico. They cannot be aliens in Porto Rico, and, therefore, the Porto Ricans cannot very well be aliens in New York, and there cannot be any reciprocity. This illustration reduces that contention to an absurdity at once.

I was speaking of the two only cases in our law in which alienage and subjection had not been identical. We have seen that at English law they were necessarily and always identical and mutually exclusive.

The framers of the Constitution did not define citizenship; and I think the evidence is that they probably assumed that citizenship was what was meant by subjection at the English law, and that they were to be determined by the same tests. That is what was decided in the case of Wong Kim Ark, the Chinese baby case. But when the Dred Scott case came to this Court, for the first time in our law—I say "in our law," because there are instances in other laws, to which I shall refer—it appeared that there was a class of persons who were not citizens, yet were not aliens.

The Constitution confers upon every citizen of the United States the right to sue in a Federal Court. Dred Scott was denied that right on the ground that he was not a citizen. But it was not contended that he was an alien. It was admitted that he was not; that he had no other allegiance. As has been said in commenting on the case of Elk *v.* Wilkins, and other cases, by members of this Court, the free negro before the war was not considered to be an alien. He was a United States national or subject, or liegeman, as you please. He owed allegiance to the Government of the United States. He was not an alien.

JUSTICE BROWN: I believe a good many of the States have half-and-half people; that is, those who have declared their intention to become citizens, but who are not entitled to vote in the national elections.

MR. COUDERT: Yes; aliens do vote in many of the States.

JUSTICE BROWN: They are aliens under the Federal law, but they are virtually citizens of the United States under the State law.

MR. COUDERT: They are State citizens.

JUSTICE BROWN: They have a half-and-half position.

MR. COUDERT: We have that strange dual conception of State citizenship and National citizenship. That question, of course, was never settled until the Fourteenth Amendment was adopted, which made State citizenship incident to National citizenship. State citizens

not United States citizens, however, are mere aliens in the eye of the Constitution and Federal laws.

I now come to the Fourteenth Amendment; and as I understand the Fourteenth Amendment, its purpose was to make subjection or nationality and citizenship identical. That amendment made all of the negroes citizens —those who had formerly been free and those who had formerly been slaves—"all persons born within the United States are citizens thereof," and so on. That expression "born within the United States and subject to the jurisdiction thereof," is the exact English equivalent of "born within the obedience of the King." So that subsequent to the Fourteenth Amendment——

JUSTICE HOLMES: It is rather curious that the Fourteenth Amendment adopted the territorial test in place of this, whereas I suppose that the later discussion and the works that I have read generally considered that parentage was the most enlightened test.

MR. COUDERT: Yes; the Fourteenth Amendment adopted *jus soli,* the English law, rather than the law of descent, the *jus sanguinis,* which seems to be more or less in vogue in continental countries.

JUSTICE HOLMES: The more fashionable view, I should say.

MR. COUDERT: It is the more fashionable view. The American view is not always fashionable, but it is getting to be more fashionable, I think, as time goes on.

But even under the régime of *jus sanguinis,* this question would remain the same. The transfer of allegiance everywhere nationalizes or naturalizes the new people, as we will see later on.

Therefore the definition contained in the Fourteenth Amendment made subjection and citizenship identical. Is it possible that subsequent to the Fourteenth Amendment there still was (and I now come to my second instance) a class of persons who were not citizens of the United States and yet were not aliens? I think that there was such a class of citizens, under the case of Elk *v.* Wilkins. It is not quite so clear as the Dred Scott

case, because it is complicated by the question of tribal allegiance; but still it is pretty clear. It is this:

An Indian had separated himself from his tribe. He had taken up the habits of civilized men, their garb and speech, and lived in one of the States of the Union. The question arose as to whether he was to be treated as a citizen or not. And though he had severed himself from his tribe and renounced his allegiance to his tribe and had no tribal allegiance (which, of course, would have made him a foreigner; if he had had a tribal allegiance he could not have been a citizen, under all the cases), it was held that, nevertheless, he was not a citizen of the United States, because he had not been naturalized as such. While he had been born within the domain of the United States, he had been born subject to another allegiance, viz., the tribal allegiance; and the Government of the United States has always treated the tribe as an entity, and the individual as owing allegiance to his tribe. That has been a legal fiction which has been consistently followed out.

What was the status of this man, separated from his tribe, owing it no allegiance, and living among us? As Mr. Justice Harlan put it in his dissenting opinion, he had been reduced to the unfortunate condition of a person who was not a foreigner and a person who was not a citizen; and we again had in our jurisprudence the unfortunate class of citizens whom we had had under the Dred Scott case. Evidently Congress took that view of the decision, the view that was stated by Mr. Justice Harlan in that case; because Congress passed an Act, within a few years, which declared that an Indian who was separated from his tribe was a United States citizen, endowed with all the rights thereof.

Those are the only instances, I will say in reply to Mr. Justice White's question, that I can think of in which allegiance and subjection have not been wholly identical, and in which we had persons who undoubtedly owed allegiance to the United States and who were not considered by the courts as United States subjects.

I ought to say right here, and I perhaps ought to have said it sooner, that the question has been complicated in this country as it probably would not be elsewhere by the fact that, with us, the word "citizenship" is constantly used in a double sense. "Citizenship" primarily, etymologically and properly means a participant in political rights and privileges; a person who, as some witty man has said, "is endowed with a homeopathically-diluted dose of sovereignty." That is the real citizen—the burgher, the person who has political rights. In its broad sense, however, it includes all members of the nation. (Minor *v.* Happersett, 21 Wall, 162.)

That has led to a great deal of misconception, because we do not claim that any of these people had political rights. Political rights are conferred, usually, by one of the States of the United States, and are totally independent of citizenship in the broader sense in which it is the equivalent of subjection. For instance, to make that quite clear, Mr. Cogordan, in his work on "Nationality," explains:

All citizens are nationals, but all nationals may not be citizens. For, he says, speaking of the French law particularly, Citizens are, first, all those who are the holders of political rights, who have a status in the State. Second, they are all persons whatsoever possessing the ordinary civil rights of Frenchmen, owing allegiance to France, such as minors, incompetents, and women. Those are the two ordinary categories of citizens. The first might be termed active citizens, and the second passive citizens. It is in that sense a passive citizenship which is equivalent to subjection.

But he goes on to say that, in addition to passive citizens, there may be and there is a third class; and this brings me to the illustrations that I want to give from the expansion or imperialism practiced in other governments, and which throws light on our peculiar and anomalous legal situation here.

He says that there are French nationals who are not French citizens in any sense; not in the sense of the

holders of political rights; not in the passive sense as women, minors and incompetents; but yet they are French subjects. He instances, for example, the Algerians, who, until recently, have been and still are, to a great extent, subject solely to their own Mussulman law and customs. These people, he says, are French subjects and French nationals, although they are not citizens. That instance shows that there may be a category of persons, and that there are categories of persons in other systems of law who owe allegiance and are subjects, are liegemen, but are not citizens.

In the case of Algeria the decisions of the French courts bring out this distinction very clearly, and seem to me to throw light on our problem, and to make the decision of the Circuit Court in this case seem wholly illogical and out of accordance with all general jurisprudence. When Algeria was annexed and permanent occupation assumed by the French, a case came up before the highest French Court, the Court of Cassation, away back in 1834. An Algerian Israelite demanded admission to the French bar and the administration refused it. They said: "Why, you are an alien; you are not a French citizen. You are an alien, and aliens cannot be admitted to the bar;" and the matter went up to the Court of Cassation.

The Court said that from the moment of the annexation, the cession of Algeria, the ending of Mussulman sovereignty in Algeria and the transfer of the sovereignty to France, the inhabitants ceased to be aliens. They did not necessarily have any political rights as French citizens, and they did not decide that they became French citizens; but they used the expression which the French Convention had objected to back in 1800 on sentimental grounds; they used the expression, *"sujets Français,"* and held them French subjects, although France is a republic.

That jurisprudence has been followed out in France in the annexation of Anam, in China. The same question arose there when Anam was annexed; and they

said that the moment that the Anamites ceased to owe any allegiance to the Emperor of China they became French subjects. They did not have, perhaps, the rights of all French passive citizens, but their allegiance being shifted, they were not under the disabilities of aliens.

Those illustrations show how other courts have treated the matter, and indicate a perfectly logical way in which they may be treated. That is to say, that at least the transfer of allegiance converted them from foreigner into something else. And whether you call that something else "subject," as the French have called it, in their jurisprudence, *"sujet Français,"* or whether you call it liegeman, which is a prettier expression, or whether you call it national, which is an international law expression, is absolutely a matter of indifference.

Therefore we have seen that the treaty having transferred the allegiance of the Porto Ricans they ceased to be foreigners under the rules of English law, under the American law, as understood at international law, as well as illustrated by the actions not only of Great Britain that we have cited, but of the French in Algeria and their other conquests. In Algeria they treated the natives perhaps more intelligently than we have treated the Indians. While the Mussulmen have always lived under their own tribal customs and have been allowed so to live, they have never been recognized as being *quasi* foreigners, as we recognize the Indians and as having had any other allegiance. They have always considered them as French subjects, but French subjects who did not have the full rights under the French law, but were subjected to their own law.

Very curious cases have arisen under this state of facts, which I have not taken the time to mention in my brief; but one of them brings out the peculiar situation and shows how it has worked out. The Israelites in Algeria were made by statute full French citizens, not subjects. They were not living in tribal relation, and they had no peculiar law of their own.

When they became French subjects they invoked against the Arab tribes the rule of the French law that where property is owned in common by anybody, no Frenchman is forced to remain tenant in common; that is, he has a right to partition. Now, the Arabs held a lot of land in common; and some shrewd Israelites purchased a share from a member of one of the Arab tribes and then brought a partition action and served them all with notices, with the blue legal notices common under the French system, which they probably used to light their pipes. Presently, however, they found that their land had been sold under a judicial decree, and great confusion arose; and finally special regulations had to be made, and the property law of the Musselmen and that of the other inhabitants of Algeria who had risen to the dignity of passive citizens had to be assimilated and reconciled, so that such cases could not come up.

So much for illustration. Therefore I cannot, I confess—and I say it with great frankness, the argument seems to me so plain that they ceased to be aliens and foreigners—see any answer to it whatsoever. Usually there are two sides to a question. Usually these questions are complicated and difficult. I have not read the Government's brief yet, having this moment received it. I rely upon the decision of Judge Lacombe as virtually setting out their contention. But I cannot see, unless words have ceased to have all their meaning, how those people can be aliens; because, after all, words must denote some definite conception. Otherwise the human voice would be a useless organ, and all systems of law would be destroyed. When a statute says "alien immigrant" it means an alien coming from a foreign country; aliens cannot owe allegiance to the United States and Porto Rico is not a foreign country.

That is enough to determine our case, as it seems to me. But if I can be borne with for a few moments longer, I would like to take up another consideration.

It seems to me that while this is perhaps enough to determine the case, that these persons really have become, despite the language of the treaty reserving their civil rights and political status to Congress, more than mere United States nationals or subjects. They are more than that. I think that they have been naturalized and become citizens.

Of course I admit that the Fourteenth Amendment provides for two cases only; both are naturalization within the United States. Whether the Fourteenth Amendment applies to Porto Rico of course I am wholly in ignorance, because whether Porto Rico is in the United States or not within the meaning of the Fourteenth Amendment is a question that we can know nothing about until this Court definitely defines that term. Future developments will have to show. Therefore the Fourteenth Amendment may not apply or affect the question at all. These people have clearly been nationalized. It is possible that they have not been naturalized. They have not been naturalized by the Fourteenth Amendment; they have not been naturalized by specific acts of Congress conferring naturalization. There is only one other method by which they can be naturalized and become citizens of the United States. That method is the collective method of naturalization by treaty. Of course if the treaty had said that they should become citizens of the United States this case would never have come to this bar.

I claim this, and claim it is the broad and proper view to take of this case, and that it wholly disposes of it.

Congress cannot change facts by reservation. The third class of persons whom I have mentioned, whom we have seen have existed in one or two instances that we are not very proud of in our law, and have existed under other systems of law, are a class of persons abhorrent to us, as Mr. Justice Harlan well expressed it in the case of Elk *v.* Wilkins. They are a class of persons who perhaps may not be under the disabilities of

alienage, but who are certainly in a most unfortunate, and I think it is fair to say, in rather a degraded position. Now, in shifting their allegiance I believe it is the intention of the jurisprudence of this Court, and I think it is the public sentiment of the country, and I think it is the intention of Congress, that allegiance and citizenship (passive citizenship), shall go together; that when their allegiance was transferred to the United States, that was a naturalization; and that by reserving the political rights and civil status of these people Congress could not prevent what seems to me to be a proper and necessary consequence of American law, viz., their becoming citizens.

Therefore there are only three views possible, I may say in conclusion, of this case. The Court may affirm the decision below, and declare native islanders born before the cession, aliens. If so, then language will cease to have any meaning. We can only bow to authority; but this is a forum of reason, and we are absolutely convinced, that this court can not take that view. It is impossible; it is absurd; it is grotesque.

What is the second view? The Court may hold that by transferring their allegiance they ceased to be aliens. It must hold that they have become United States nationals, that they were not under the disabilities of alienage under the immigration law, that they were not under the disability of alienage in the States, such as, for instance inability of holding real estate. All aliens under the Constitution have certain general rights. Probably the only right they would not have, the only right that I know of, at least, would be the right of suing in a Federal court. In the development of law jurisprudence and political science, the disabilities of alienage, so great in ancient times have been practically removed, so that as far as civil rights are concerned there are almost no distinctions in civilized countries between aliens and citizens. And even if these people should be held to be not citizens and not aliens, they will have nearly if not quite all the rights of passive citizens of the United States.

But I say that this Court must be forced, unless they desire to take a very narrow and a very technical view, to go a little farther and to say that while the treaty did reserve their civil rights and their status, it only did so so far as it was consistent with the transfer of allegiance, and that their allegiance having been transferred they were collectively naturalized by the treaty and that there are no persons under the broad dominion and sovereignty of the United States who are in the same status as the free negro before the war under the Dred Scott decision, and the similarly degraded condition of the Indian separated from his tribe, under the case of Elk *v.* Wilkins, and that all persons who owe allegiance to the United States are not subjects or even liegeman, but necessarily citizens. I trust that that is the view that this Honorable Court will take.

JUSTICE HARLAN: Mr. Coudert, have you considered the question of those words of the immigration act which say that all decisions made by the inspection officers or their assistants touching the rights of any aliens who land, when adverse to such rights, shall be final unless appeal be taken to the Superintendent of Immigration, whose action shall be subject to review by the Secretary of the Treasury?

MR. COUDERT: I have, sir, and my answer to that is that if the contention be that the Secretary of the Treasury has a right to decide whether or not they are aliens, and thus to assume jurisdiction, that you or I, sir, may be held up by the Commissioner of Immigration and sent back, and that the rights of American citizens in that case are worth nothing.

JUSTICE HARLAN: Precisely that argument was made in the case of Lem Moon Sing *v.* The United States.

MR. COUDERT: I remember that case, yes, sir.

JUSTICE HARLAN: Where a Chinaman who had been in this country went back to his home, was gone perhaps a year and returned, having a domicile here as a merchant. He claimed the right to enter the United States, and the Collector said, "No, you are not entitled to enter

the United States." He sued out a writ of *habeas corpus,* I believe, without appealing to the Secretary, and the authority of Congress to commit the determination of those questions to his executive officers without judicial interference was sustained. Have you examined that case?

MR. COUDERT: I have seen that case. I hardly think that the Court will want to extend the doctrine. As I understand it there is a little difference in this—that there the Immigration Commissioner had a right to determine certain facts as to domicile, etc., and that here the only question is absolutely a question of law as to the effect of the treaty.

JUSTICE HARLAN: Suppose the question of fact was, in relation to the Commissioner here, whether or not this person was a Porto Rican or a Spaniard, and he had to determine that fact?

MR. COUDERT: It is possible that under the doctrine in that case the Commisioner would have a right to determine those particular facts; but that, it seems to me, is going very far, the basis of his jurisdiction must be alienage.

JUSTICE HARLAN: I do not mean to say that that case controls this one; I only call your attention to it.

MR. COUDERT: I will perhaps advert to it a little more in my reply brief. I knew of it in a general way. Of course the Chinese statutes have been somewhat different and peculiar in themselves. But I conceive it impossible that where there is any question of fact whatever for the Commissioner to determine, he can determine a great principle of international law and of treaty right and finally decide that a person who claims not to be an alien, who is at least a subject, to put it most modestly, is an alien, because then his power would be as great as that of this Court, and anybody could be excluded under that doctrine. That seems to me impossible.

I thank the Court for its kind attention.

Argument of Paul Fuller, Esq., on behalf of the Petitioner-Appellant.

MR. FULLER: To take up the last proposition of my friend on the other side, if Mr. Degetau is an alien, as the commissioner from Porto Rico, whom does he represent? Does he represent aliens? If he represents aliens, what has Congress to do with aliens?

JUSTICE HARLAN: Is he a delegate or a commissioner?

MR. FULLER: A commissioner; but he has a right to appear before the Congress. He has a right to come into Congress, but he does not speak; he does not vote. He has a right to communicate to Congress, on behalf of whom? Of aliens? And has Congress anything to do with aliens, that they should require a commissioner to tell them what the needs of those aliens are?

Now, by Act of Congress as well as by treaty or cession, the nationality and allegiance of the people of Porto Rico was changed. The Act of Congress, dealing with a condition of great difficulty, endeavored to create a new body politic, and it did create a new body politic. It called that body politic "citizens of Porto Rico;" but surely they were no longer subjects of Spain. And I may say that the distinguished Senator whose name fathers that bill begged me not to believe that he fathered that distinction. He got what he could. He called them citizens of Porto Rico and added that they were entitled to the protection of the United States.

Who is the United States entitled to protect? Is it entitled to protect aliens? As against whom? As against the government of those aliens? No. It is entitled to protect its nationals, and nothing else. "Protection" and "allegiance" are correlative terms. It has the allegiance of the Porto Ricans; it owes them protection. That makes them nationals.

To come to the only distinguished utterance made on the other side that seems to be strange and alarmist, I

mean Attorney-General Cushing when he speaks of "domestic aliens"—in other words, free slaves. There is just about as much law in one as in the other. Let us see exactly what he does say, because I have a great respect for his memory.

He says, in regard to the Indian:

"The moment it comes to be seen that the Indians are *domestic subjects* of this Government, that moment it is clear to the perception that they are not the sovereign constituent ingredients of the Government."

In other words, they are not citizens, and they have no political rights, but they are domestic subjects.

He continues:

"This distinction between *citizens* proper—that is, the constituent members of the political sovereignty—and *subjects* of that sovereignty, who are not therefore citizens, is recognized in the best authorities of public law."

That is all we contend for—that recognition which Mr. Cushing says is to be found in the best authorities of public law, and which recognizes subjection, allegiance.

JUSTICE WHITE: If I understand your argument, this case does not concern itself at all with any question of any power of Congress. It concerns itself only with what is the meaning of the word "alien" in that connection?

MR. FULLER: Yes, sir; that is all, except that if Congress had attempted to do anything else, possibly it would not have had the power. But it is useless to cross the stile until we get to it, and therefore we do not discuss that. We simply say that these people are nationals.

The Attorney-General of the United States had that question put before him in a very peculiar case with which I will trouble the Court; and then, in order not to trouble you any more with oral argument, I will beg the privilege of submitting a short brief in answer to those

we only received this morning. The Attorney-General had before him the case to which Mr. Coudert referred, of Mr. Molinas, who was classed as an American artist under the tariff law. The tariff law provided that works of art which were the production of American artists residing temporarily abroad should be free from duty. Mr. Molinas was in France when the little revolution or war occurred by which his allegiance was transferred. He arrived at New York with his paintings, and he said: "I am an American artist." "Where were you born?" "In Porto Rico." "Have you been naturalized?" "No." "Were you in Porto Rico at the time the treaty was made?" "No; I was in Paris temporarily, but I was a resident and an inhabitant of Porto Rico."

The matter was finally referred to the Secretary of the Treasury, who asked for the opinion of the Attorney-General; and the opinion of the Attorney-General was to this effect: "This man is an American artist." He cannot be an American artist without being an American, and he cannot be an American and an alien. He goes on to say even supposing that a native Porto Rican has been unintentionally omitted from Section VII, "he is undoubtedly one of those turned over to the United States by Article IX of the treaty to belong to our nationality. He is also clearly a Porto Rican. As his country became a domestic country and ceased to be a foreign country within the meaning of the Tariff Act above referred to, and has now been fully organized as a country of the United States,—it seems to me that he has become an American, notwithstanding such supposed omission."

I do not like to pit the Attorney-General against the Solicitor-General, because they are both good friends. But that is the administrative view. I trust it will be the judicial view. You will find nothing in this brief, which I have carefully read in the last hour as I have had the opportunity, to discountenance that theory.

I am very happy to be here in a case where I have no comments to make on the dissent in this Court and am

not subject to the misinterpretation from which I suffered this morning.

THE CHIEF JUSTICE: We will hear you Monday morning, Mr. Degetau.

The Court thereupon adjourned until Monday, December 7th, 1903, at 12 o'clock M.